IN THE

Supreme Court of the United States.

October Term, 1978.
Nos. 78-329, 78-330.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS, AND
JANE HUNERWADEL,
INTERVENOR-APPELLANT,
v.
WILLIAM BAIRD, ET AL.,
APPELLEES, AND
PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, CRITTENTON HASTINGS HOUSE & CLINIC AND PHILLIP G. STUBBLEFIELD, M.D.,
INTERVENOR-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Brief for Intervenor-Appellees.

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Prior Opinion and Opinions Below.

This case[1] was previously before this Court and remanded to the district court on abstention grounds. *Bellotti* v. *Baird*, 428 U.S. 132 (1976) (*Bellotti I*).

[1] Nos. 78-329 and 78-330 are appeals from the same decision below, have been ordered consolidated by this Court, and are treated in this Brief as one case.

The district court initially declared unconstitutional a Massachusetts statute, now § 12S (formerly § 12P) of chapter 112 of the Massachusetts General Laws, as well as portions of other statutes which referred to it, and enjoined enforcement thereof; its opinion is dated April 28, 1975 and reported at 393 F. Supp. 847 (D. Mass. 1975) (1 App. 499). On July 1, 1976, this Court vacated the district court's order and remanded the case for further proceeding, including certification of appropriate questions concerning the meaning of the statute to the Massachusetts Supreme Judicial Court. 428 U.S. 132, 151-152. (Enforcement of the statute was stayed without opinion. 429 U.S. 892 [1976].)

The district court certified questions to the state court on August 31, 1976 (1 App. 23), and the state court's answers appear in an opinion dated January 25, 1977 and reported at Mass. Adv. Sh. (1977) 96, 360 N.E. 2d 288 (1 App. 531).[2] Upon consideration of the state court's answers, the district court stayed enforcement of the statute *pendente lite* in an opinion dated February 10, 1977 and reported at 428 F. Supp. 854 (D. Mass. 1977) (1 App. 610). After a further trial, the district court declared unconstitutional the statute as constructed by the state court, as well as portions of other statutes which referred to it, and enjoined enforcement thereof; its opinion is dated May 2, 1978 and reported at 450 F. Supp. 997 (D. Mass. 1978) (1 App. 640).

Jurisdiction.

This case was brought on October 30, 1974, and a three-judge district court was convened on November 6, 1974 under 28 U.S.C. §§ 2281, 2284, as then in effect (1 App. 2).

[2] The decision is not yet published in the Massachusetts Reports, and therefore, is hereinafter cited only to the Northeastern Reporter.

The district court's opinion and order which are the subject of this appeal are dated May 2, 1978 (1 App. 64-65). Appellants and intervenor-appellants claimed their respective appeals pursuant to 28 U.S.C. § 1253, and this Court noted probable jurisdiction on October 30, 1978. 47 U.S.L.W. 3292-93 (Oct. 31, 1978).

Statutes Involved.

In 1974, the Massachusetts legislature, over the governor's veto, passed "An Act to protect unborn children and maternal health within present constitutional limits."[3] This Act added certain new sections to chapter 112 of the Massachusetts General Laws. The principal section (sometimes referred to in this Brief as "the statute") which was declared unconstitutional by the district court is § 12S:

> § 12S. If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died, or have deserted their family, consent of the mother's guardian or other persons having duties similar to a guardian, or any person who has assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physi-

[3] 1974 Mass. Acts c. 706; the sections were relettered and corrective references inserted by 1977 Mass. Acts c. 397.

cian performing the abortion who shall maintain it in his permanent files.

Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent for the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve U.

The district court also declared unconstitutional such other portions of chapter 112 as make reference to § 12S. Section 12Q makes all non-emergency abortions subject to § 12S. Violations of § 12Q are made criminal by § 12T and punishable by a fine of not less than $100 nor more than $2,000. Section 12U permits the state attorney general or any person whose consent is required to petition the state superior court for an order enjoining the performance of any abortion which would be performed contrary to § 12S.

Questions Presented.

1. Whether the district court erred in holding that the consent provisions of Mass. G.L. c. 112, § 12S (a) unduly burden a mature minor's constitutional right to decide whether to terminate her pregnancy, or (b) unjustifiably discriminate against a minor's constitutional right to decide whether to terminate her pregnancy.

2. Whether the district court erred in invalidating the statute on its face.

3. Whether the district court erred in its refusal to adopt savings constructions contrary to the statutory constructions in the state court's answers to certified questions.

4. Whether the district court committed reversible error (a) in its pre-trial procedural discovery order denying defendants-appellants' August 1, 1977 motion for leave to

contact members of the plaintiff class in order to conduct a survey of health care provider consent practices, or (b) in its post-trial order allocating certain litigation costs.

Statement of the Case.

Proceedings Below.

Four teenage women, their physician, an incorporated family planning clinic and the director of the clinic brought this class action in the district court in October, 1974 challenging on constitutional grounds a Massachusetts statute (Mass. G.L. c. 112 § 12S [formerly § 12P] in particular) which restricted the rights of minors to obtain abortions. 1 App. 1. The Massachusetts Attorney General and others were named as defendants (1 App. 85) and Jane Hunerwadel, a parent, was allowed to intervene as a defendant representative of the class of Massachusetts parents having unmarried minor daughters. 1 App. 5; *Baird* v. *Bellotti*, 393 F. Supp. 847, 849-850 (D. Mass. 1975) (*Baird I*). In 1978 the district court permitted post-judgment intervention on plaintiffs' side by intervenor-appellees, Planned Parenthood League of Massachusetts and Crittenton Hastings House & Clinic, organizations which provide counseling to pregnant adolescents, and Phillip G. Stubblefield, M.D.[4]

The case was first tried in 1975. After hearing several days of testimony, a majority of the three-judge district court found the statute to be unconstitutional and permanently enjoined its enforcement. *Baird I, supra,* 393 F. Supp. 847.

In its opinion, the district court also found that one of the plaintiff minors ("Mary Moe I"), her physician, and

[4] Prior to their intervention, these parties had been accorded a special stature more than that of an amicus. *Baird* v. *Bellotti*, 450 F. Supp. 997, 999 n.3, 1001 n.6 (D. Mass. 1978).

the family planning clinic had standing, for the party plaintiffs, and Jane Hunerwadel had standing, for the intervening defendant parents, as "adequate class representatives," and certified the classes "as to all." *Baird I* at 852. In particular, Mary Moe I was found to have standing to represent the class of unmarried minors "who have adequate capacity to give a valid and informed consent, and who do not wish to involve their parents." *Id.* at 850. The physician and family planning clinic were held to "have standing to attack the statute as applied to *all* minors, at least insofar as it requires the consent of both parents."[5] *Id.* at 852 (emphasis added). As all minors were before the court, and as the district court specifically held that "[t]he statute . . . applies to all minors" (*Baird I* at 855), the district court's declaration of the statute's unconstitutionality was not limited to any subclass of those to whom it applied. 1 App. 13-14.

At the first trial, appellants had made representations to the district court as to the meaning of several provisions of the statute. *Baird I* at 855. On appeal to this Court, appellants, inconsistently with those representations, argued that ambiguity in the meaning of those same provisions permitted a construction of the statute which might obviate or modify the constitutional question presented. Relying upon those arguments of ambiguity, this Court vacated the decision below, ordered abstention, and directed the district court to certify questions about the meaning of § 12S to the Supreme Judicial Court of Massachusetts. *Bellotti I*, 428 U.S. 132. A single justice of this Court stayed the enforcement of the statute pending a response to certified questions, and this Court summarily denied an application

[5] As the state court subsequently construed the statute, it requires parental notice in every case, including the case where notice is against a minor's best interests. This requirement affects "mature" and "immature" minors alike.

to vacate that stay. 429 U.S. 892 (1976). The district court certified a series of nine questions to the Supreme Judicial Court, which heard arguments and received briefs from persons who are parties here.

The decision of the Supreme Judicial Court, *Baird* v. *Attorney General*, 360 N.E. 2d 288 (1977) (*Attorney General*), rejected many of the interpretations of the statute proffered by appellants to this Court and to the state court. Appellants had contended: 1) that because of the Massachusetts "mature minor" rule, a minor who was "determined by a court to be capable of giving informed consent [to an abortion] will be allowed to do so [without judicial override of her decision]", *Bellotti I*, 428 U.S. at 144; 2) that "a mature minor capable of giving informed consent [may] obtain . . . an order permitting the abortion without parental consultation", *id.* at 145; and 3) that "even a minor incapable of giving informed consent [may] obtain an order without parental consultation where there is a showing that the abortion would be in her best interests", *id.* The state court rejected each of these interpretations. The state court held that the statute requires all minors (unless married or previously married) to obtain the written consent of both parents to an abortion and, should either parent not consent, to obtain the consent of a superior court judge based on his view of her best interests. In particular, the state court held that the statute mandates parental consultation in all cases, including cases where a mature minor has given an informed consent and cases where the state superior court judge would find that parental consultation is contrary to the best interests of the minor. *Attorney General* at 296-297.

The state court held that the issue before the superior court judge is not whether the minor is capable of giving an informed consent, but whether, in the judge's view, an

abortion is in the best interests of the minor. *Id.* at 293. The superior court judge, thus, may override the informed consent of a mature minor. The state court held that the burden is on the pregnant minor to commence the judicial proceeding and obtain consent of the superior court judge, and that the parents must be named as defendants and given notice of the superior court proceedings and an opportunity to contest. *Id.* at 297, 298.

In its opinion, the state court also said that, if any of its interpretations of the statute did not meet constitutional standards, then it meant to interpret the statute in any way which did meet those standards:

> If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principle that we would have construed the statute to conform to that interpretation. *Attorney General* at 292.

With such guidance as to the precise meaning of the statute, the case was returned to the district court.[6]

Upon receipt of the state court's answers, and after hearing, the statute was stayed. *Baird* v. *Bellotti,* 428 F. Supp. 854 (D. Mass. 1977) (*Baird II*). Further discovery commenced on February 22, 1977 (1 App. 29), and extensive discovery followed (*see* 1 App. 29-55). Hearings were held on April 5 and 13, and the parties were directed to meet concerning discovery and deposition schedules (1 App. 32, 34). Appellants filed an extensive "Initial

[6] The state court delayed transmittal to the district court of an attested copy of its opinion in order to give the district court time to enter any appropriate interlocutory order. *Attorney General* at 303. The state court considered it the province of the district court "to determine the Federal constitutional issue." *Attorney General* at 291.

Statement of Disputed Material Facts" on April 12. 1 App. 33. On July 13, 1977, the district court ordered that a pretrial conference be held on August 22, 1977, and that "all pre-trial discovery will be completed by Friday, August 19, 1977."[7] 1 App. 41-42. The district court allowed appellants to take the depositions of plaintiffs' experts. 1 App. 43. Thereafter, on August 1, 1977, appellants filed a motion for leave to contact members of the plaintiff class to conduct a survey of health care provider consent practices. 1 App. 44, 282. The district court unanimously denied that motion.

After evidentiary hearings in October, 1977, the district court held the statute to be unconstitutional, one judge dissenting in part. *Baird* v. *Bellotti,* 450 F. Supp. 997 (D. Mass. 1978) (*Baird III*). That decision is the basis for the instant appeals.

In the opinion by Senior Circuit Judge Bailey Aldrich, the district court found the statute to be unconstitutional because its absolute requirement of parental consultation placed an improper burden on the right of a minor ("mature" or "immature") to decide whether to continue or terminate her pregnancy (*Baird III* at 1000-1003); and its rejection of the mature minor rule as to abortions placed on the mature minor "an undue burden in the due process sense" and constituted "a discriminatory denial of equal protection." *Baird III* at 1003-1004. The court also found that, as a practical matter, the broad language of the statute improperly suggested to parents that they were free to include considerations, such as their own interests, other than consideration of the minor's best interests in deciding whether they would consent to an abortion, thus unnecessarily increasing the "incidence of

[7] This Court had previously observed in July, 1976 that "[t]he importance of speed in resolution of the instant litigation is manifest." *Bellotti I* at 151.

improper refusals" (*Baird III* at 1004) — and, by implication, the incidence of occasions when a minor would have only the choice of abandoning her abortion decision or of confronting her parents in court. Finally, the district court declined to rewrite the statute. *Id.* at 1005-1006.

Statement of Facts.

In *Baird I* and *Baird III* the district court made extensive findings of fact with respect to the central issue in this case: the effect of the statute on females under age eighteen, were it permitted to be enforced.[8] None of these findings has been challenged as clearly erroneous. These findings, read in the light of related undisputed evidence, establish, contrary to appellants' and intervenor-appellant's suggestions, that the statute will impair maternal health rather than benignly protect it and will impede intra-family communication rather than promote it.

These findings and related evidence fall naturally into three headings: (1) a description of the minors affected by the statute and their ability to give informed consent to terminating their pregnancies; (2) a description of the burdens imposed by the statutory scheme; and (3) a description of the consequences for minors of following the statutory scheme.

1. *The Minors Affected and Their Ability to Give Informed Consent.*

The district court did not make quantitative findings on the numbers of minors affected by the statute, but these data are largely available in admissions or other uncontroverted evidence. In Massachusetts, there are approx-

[8] The findings in *Baird I* are incorporated by reference in *Baird III*. *Baird III*, 999 n.2.

imately 454,000 female minors ages 10 through 17, 1 App. 155 (admissions), of whom many are obviously beyond puberty. Like teenagers elsewhere, many have sexual experiences and many become pregnant. 1 App. 157 (admissions); App. Exhibit 2, 9, 10.[9] Two-thirds of all teenage pregnancies and one-half of the births are unintended.[10] *Id.* at 16. Ninety percent of the pregnancies each year among unmarried 15- to 19-year-olds are unintended. *Id.*

Many of these teenagers will decide to terminate their pregnancies. Nationally, about 95 percent (270,000) of the teenagers who so decide are age 15 to 19 and the remaining 5 percent (13,500) are under 15. 1 App. 157-158 (admissions). (That 95 percent is comprised of 50 percent age 18-19 and 45 percent age 15-17. 1 App. Exhibit 2, 48.) Massachusetts statistics should be similar. 1 App. 159-160 (admissions). In Massachusetts, 91 percent of all abortions are performed within the first trimester. 1 App. 156 (admissions).

[9] Exhibit 2 in the district court, *11 Million Teenagers*, The Alan Guttmacher Institute, Planned Parenthood Federation of America (1976), was designated as part of the Appendices herein. To avoid difficulties in reproduction or reprinting, and at the suggestion of the clerk's office, copies have been filed with this Court separately, rather than being reprinted in a folio-sized appendix.

Admissions cited herein were admitted in evidence.

[10] These pregnancies result largely from failure to use contraceptives, and largely because of ignorance about them or lack of access to them. App. Exhibit 2, 30. This was the case here with plaintiff Mary Moe. *Baird I* at 850. However, common contraceptive measures may pose special risks for teenagers. Oral contraceptives may accelerate physical maturation and affect ultimate stature and may inhibit initiation of regular ovulation, thus reducing fertility; IUDs are less effective in teenagers because of higher expulsion rates. U.S. Department of Health, Education and Welfare, Office of Child Health Affairs, "Teenage Pregnancy" (December, 1976), 8.

National statistics show that approximately three-fourths of the pregnancies legally terminated by teenagers under age 18 were terminated by teenagers age 16 and 17.[11] The district court made specific findings with respect to the capacity to give informed consent of this 16- and 17-year-old group. "[M]any, perhaps a large majority of 17-year olds are capable of informed consent, as are a not insubstantial number of 16-year olds, and some even younger." *Baird III* at 1001. Minors appear to have a better appreciation of the consequences of having an abortion than of having a child. 2 App. 58.

2. *The Burdens of the Statutory Scheme.*

A. Parental Notice and Consent.

The district court made specific findings concerning the burden of obtaining parental consent (or notifying parents) in every case. Pregnancy in an unmarried minor is a period of great emotional stress, but while most parents probably are supportive, "an appreciable number are not". *Baird I* at 853. The court further found that "a significant number of minors who are capable of consenting are unwilling to tell their parents either because they *correctly* fear what would happen to themselves" or they know that their parents would "under no circumstances consent" or would "attempt to make them enter into a marriage they do not want." *Id.* at 853 (emphasis added). Some parents would even "insist upon the continuance of the pregnancy simply as a punishment, or to teach a

[11] A 26-state survey of reported legal abortions obtained by teenagers appears at Table 6A, U.S. Department of Health, Education and Welfare, Center for Disease Control, "Abortion Surveillance 1976" (issued 1978; HEW Publ. No. CDC 78-8205). Of abortions obtained by teenagers under 18 (81,829), 42.4 percent (34,711) were by minors age 17, and 31.6 percent (25,792) were by minors age 16.

lesson." *Id.* at 854. The personal beliefs of many parents further aggravate the problem of obtaining consent:

> Of unquestionable numerical importance, we cannot overlook the fact that many parents believe with total sincerity that abortion is morally impermissible, either under all circumstances or unless to save the life of the pregnant woman. *Baird I* at 854.

In its supplementary findings in *Baird III*, the district court found that "there are a variety of recognized reasons" why it may be in a minor's best interests for "one or both of her parents" not to be informed, including possible injury to the parents by the shock of the information and resultant feelings of guilt in the minor; the reaction of "[s]ome parents [who] are child abusers" or "at least may become actively hostile"; and the reaction of "parents who would insist on an undesired marriage or on continuance of the pregnancy as punishment." *Id.* at 1001. "We may suspect, in addition, that there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court. This would seem but a normal reaction of persons who hold strong anti-abortion convictions." *Id.* at 1001. The district court also accepted appellants' own observation in their brief to the district court that the statute reflects "'legislative recognition of the unfortunate fact that parents are not always supportive of their pregnant daughters and may, the evidence suggests infrequently, refuse to consent to the performance of abortion surgery although the surgery is in their child's best interests, or mistreat her in other ways.'" *Id.* at 1002.[12] Not surprisingly, the dis-

[12] The harm from requiring consent or consultation with the "appreciable number" (*Baird III* at 1001; *Baird I* at 853) of non-supportive parents can occur with respect to abortions in any trimester. *Baird III* at 1001.

trict court also found that the "immature minor" may, in fact, be the "least capable of dealing with a hostile family situation." *Id.* at 1001. The plaintiff Mary Moe [I] herself, who was sixteen years old, testified that she did not want to tell her parents because she felt certain, based on remarks made by one of her parents in connection with the pregnancy of a friend, that this parent would take physical action against the boy involved. *Baird I* at 850. Of course, sometimes such fears are based on parental "threats that they do not mean, or would not carry out", but the threats themselves "nonetheless serve to destroy intercommunication." *Baird* I at 853.

The district court also made specific findings concerning the separate and distinct burden of obtaining *both* parents' consent in every case. The burden is especially acute in the case of the "immature minor" (the minor incapable of giving informed consent), for whom a valid consent by someone is required. The district court found that the Massachusetts custom and practice with respect to medical treatment for an immature minor was to proceed with the consent of *one* parent. *Baird I* at 852, 855. The "variety of recognized reasons" for bypassing parental consent or notice in some cases applies with respect to "*one or both*" of the parents. *Baird III* at 1001 (emphasis added). As one expert put it, without contradiction, "we often see a mother come in with a teenager saying, 'don't let my husband know about it because he'll kill her'." 2 App. 148. If that one parent has not consented, the minor must proceed to court under the statutory procedure.

B. Court Proceedings.

As the district court found, "the burden [on the minor] of seeking a court order [to allow her to have an abortion]

— is a heavy one." *Baird III* at 1001. The expert testimony (found credible and uncontradicted by the district court, *id.* at 1001) was that "court proceedings . . . even if conducted in the most benign manner, would be 'severely detrimental to a teenager, particularly since she has just met with her parents' disapproval,' . . . ." *Id.* at 1001. *See* 2 App. 295-296, 422.

If the minor were to bring judicial proceedings against one or both parents to overturn a refusal to give consent, she would encounter a number of practical difficulties. These include the absence of specific court rules for such proceedings; the difficulty of a poor minor in obtaining legal guidance for the stages of litigation prior to court-appointment of a lawyer; the risk of delay [13] arising from the absence of any court sessions or judges whatsoever in certain superior court courthouses at various times of the year and the possibility of having to appear for two hearings rather than one; and the simple fact that the minor must disclose her out-of-wedlock pregnancy and dispute with her parents to strangers (a clerk, a judge, a court reporter). (Additional facts are set forth, post, in Argument I D.)

But assuming a minor were to succeed in bringing judicial proceedings and obtaining a decision, the consequences to her, whatever the result, were found by the district court to be severely harmful. If the minor loses, it is obviously "a personal blow, and scarcely a redemption of the ill feeling and tension [between minor and parents] that undoubtedly resulted from her parents' re-

[13] The district court found that, as the minor reaches the end of the first trimester, the medical and psychological risks involved require that the abortion decision be made "as soon as possible." *Baird I* at 853; *see* 1 App. 401 (admissions). *See also* U.S. Dept. of HEW, "Abortion Surveillance," *supra,* n.11, at 7 (mortality rate for abortion increases "40%-60% for each week of delay after the 8th week").

fusal of consent and her taking them to court." *Baird III* at 1002. Indeed, as to the mature minor, it is "highly traumatic . . . to be refused a desired abortion." *Baird III* at 1003. Yet if the minor "wins" in her suit against her parents, the district court, crediting the testimony of appellants' own expert, found that "she is likely to find herself in an even worse position." *Baird III* at 1002. The testimony of this expert, Dr. Sprague W. Hazard, was quoted in part by the district court (*Baird III* at 1002 n.7), but his full testimony, in response to questions by appellants' counsel as to the consequences of court proceedings, bears setting forth here.

> A. It seems to me that when affairs have reached this point where the relationship between the parents and the child have become a courtroom issue that I would have a lot of misgivings about the validity of the relationship between the parents and the child and how capable they are of being valid support for this child in the future.
>
> It seems to me that the lines have been drawn in a way that are not productive as you have stated them. My opinion is that the adolescent child should have certain rights about her life and her body and what happens to it and this should be taken into consideration at that time.
>
> Q. Assuming that those issues were taken into consideration, Doctor, that is to say the judge was quite concerned with the adolescent's rights and what would be in her best interests and how to advance those best interests, do you have an opinion as to what the consequences for that kind of procedure might be for the adolescent?
>
> A. The consequences, if the decision was made in favor of the child for quality family relationships are not good. The need for support on the part of the child would be abandoned at this point and the child would be abandoned at this point and her need for support would be great and again hopefully circumstances could be developed whereby those kinds of supports could be developed.
>
> Q. Will you tell us, Doctor, the basis of your concern for the lack of support for the child, why you feel the child would lose support?
>
> A. It would be my estimate that a family had been unable to resolve this except to go to a court setting were trying to express other rights on their own rather than take into consideration the whole needs of the child.

2 App. 423-428.

3. *The Consequences of the Statute for Minors.*

The obvious consequence of the statute for minors is that it reduces the availability to them of legal abortions in Massachusetts. Because of the burdens of the statutory procedures, many minors, as the district court found, would simply refuse to try to obtain a legal abortion in Massachusetts if it meant compulsory notification of both parents or suing them in court. "[A] significant number of minors . . . are unwilling to tell their parents" because of correct fears or knowledge about their likely reaction. *Baird I* at 853. "[A] substantial number of minors would refuse to consult with their parents under any circumstances." *Baird III* at 1001 (noting testimony of appellants' expert).[14] Appellees' expert "credibly testified that

[14] This testimony appears at 2 App. 415, where the witness accepted the word "refuse". *Compare Baird III* at 1010 n.4 (dissenting opinion arguing that witness only used word "reluctant").

many minors would not go to court, especially if it had to be against her parents, but rather would resort to illegal and frequently dangerous abortions."[15] *Baird III* at 1001-1002. That expert also testified that some minors would go to another state which did not have parental/judicial consent requirements.[16]

> [Teenagers will avoid these requirements by] going out of state, by attempting abortions themselves or finding non-medical means of obtaining abortions be it friends or people in the community who are known to provide the services rather than, one, confront their parents, and two, confront any other authority about the problem.

2 App. 300.

The effect of reducing the availability of legal abortions is, of course, that many minors will simply give up and have an unwanted baby (possibly with an "undesired marriage"[17]). This will be especially true for the immature minor — the minor "least capable" of dealing with parental opposition. *Baird III* at 1001.

[15] Another alternative which some may choose is suicide. There is a relatively high risk of suicide among unmarried minors who become pregnant during adolescence. U.S. Dept. of HEW, "Teenage Pregnancy," *supra*, n.10 at 7. *See* 2 App. 314-315 (greater psychological problems among unmarried minors who continue a pregnancy than among those who terminate it).

[16] "Teenagers in this situation are apt to and have in the past sought to obtain an abortion by means that they may see as less difficult for them and those means may in fact be more dangerous to them ultimately." 2 App. 299.

As to the burdens and deterrent effect of travel, especially for unmarried black minors, *see* Shelton, et al., *Abortion Utilization: Does Travel Distance Matter?*, 8 Family Planning Perspectives 260, 262 (1976). *See also* App. Exhibit 2, 50 (need to travel reduces abortion use).

[17] *Baird III* at 1001. Sixty percent of premaritally pregnant mothers aged 17 or younger who marry are separated or divorced within six years. App. Exhibit 2, 28.

The consequences for a minor of being compelled to bear an unwanted child are grave. First, as the undisputed evidence indicated, the minor faces severe adverse social consequences from an unwanted pregnancy. "Teenage motherhood involves a host of problems, including adverse physical and psychological effects upon the minor and her baby". 1 App. 406 (admissions). For female teenagers, pregnancy is the most common cause for quitting school; eight out of ten women who become mothers at age 17 or younger never complete high school. App. Exhibit 2, 25. Accordingly, "teenage mothers are less likely to work and more likely to be on welfare than mothers who first give birth in the 20's." *Id.* at 26. In one New York study, "seventy-two percent of mothers who first gave birth at ages 15-17 were receiving welfare, a rate 4.6 times that of women who first gave birth at ages 20-24." *Id.* This accords with statistics showing a correlation between early pregnancy and poverty — the younger the woman at first birth, the poorer the family. *Id.* at 27.[18]

The consequences for the minor's health of being compelled to bear a child are equally grave. The district court expressly found that the evidence in this case supported this Court's prior conclusion in *Roe* v. *Wade*, 410 U.S. 113 (1973) that "continued pregnancy and childbirth

[18] Although the district court did not address the matter of the consequences for the baby of a teenager who carries her pregnancy to term, the evidence was not disputed that such a baby faces more risks than babies of older women. App. Exhibit 2, 22. For example, if the teenager is 15 or under, the chances are more than twice as high that the baby will die. *Id.* Similarly, babies born to teenagers are "much more likely to be premature or of low birth weight" than babies of older mothers; and low birth weight is a major cause of infant mortality, illness, and birth injuries such as neurological defects which may involve lifelong mental retardation. *Id.*

involve greater medical and psychological risks than a properly performed first trimester abortion." *Baird III* at 1004. "The same comparative findings . . . apply to psychological risks as to physical." *Id.* For minors, the risks of childbirth are even greater than for adults. "The death rate from complications of pregnancy, birth and delivery is 60 percent higher for women who become pregnant before they are 15 . . . [and] for 15-19 year olds is 13 percent greater than for mothers in their early 20's." App. Exhibit 2, 23. Adolescent mothers are also "more likely to have complications during labor or as a result of premature birth." *Id.* Additionally, "pregnancy among very young teenagers depletes the nutritional reserves needed for their own growth and places them at higher risk for a variety of ills." *Id.* at 23.[19] It is these "young teenagers," teenagers who will likely be "immature" minors, who are most at risk from being forced to have a baby. Yet under the statute, it is these minors who can most easily be forced to do so.

In summary, the consequences of the statute in fact would be to make legal abortions more difficult to obtain, to deter pregnant minors from attempting to obtain them, and to force pregnant minors to have unwanted children.

Summary of Argument.

The district court correctly concluded that the statute was unconstitutional in placing undue burdens on a minor's right to decide in favor of having an abortion. As construed

[19] According to a publication of the Public Health Service, "the average age of menarche is 12.5 years, and girls' average age for complete physical maturity is several years later." U.S. Department of Health, Education and Welfare, Public Health Service, "Approaches to Adolescent Health Care in the 1970s" at 17 (issued 1975; HEW Publ. No. HSA 75-5014.)

by the state court, the statute may not be viewed as a benignly neutral aid to a minor's decision-making. Its burdens of notice to both parents in every case, judicial proceedings, and possible judicial veto of a mature minor's decision are imposed only when a minor decides to terminate her pregnancy, and never when she decides to continue it. Indeed, by its enactment of a statutory mature minor rule (Mass. G.L. c. 112, § 12F) applicable to every kind of medical treatment other than abortion or sterilization, the state has excused a minor who decides to continue a pregnancy from any kind of parental or judicial involvement with respect to treatment of her pregnancy or any other medical problem. (Pages 26-29.)

Due Process Burdens

The undue burdens imposed by the statute are several. *First*, the minor who wishes to terminate her pregnancy must obtain both parents' consent, or notify both of them of a judicial hearing. Notice must be given in every case, and may not be bypassed either in the circumstance when a mature minor has given informed consent or in the circumstance when notice would be against the best interests of the minor (mature or immature). Independent assessment by a physician or even a judge of whether notice to both parents would be in the minor's best interests is forbidden. The both-parent notice requirement also exceeds without justification the Massachusetts medical practice and custom of treating minors upon the consent of one parent, and, in addition, exposes immature minors to the separate burden of notifying a second parent even when one parent has consented and the notice would be contrary to the minor's best interests. (Pages 29-36.)

Second, the statute imposes a "judicial override" provision that permits a judge to veto the informed and reason-

able decision of a mature minor to terminate her pregnancy. In deciding whether to permit a minor to have the abortion she wants, the judge's role is not limited to determining her capacity to give informed consent, but rather, extends to determining if, in his view, the desired abortion is in the minor's "best interests". This power to veto the informed decision of a mature minor and her physician to terminate her pregnancy is squarely at odds with the fundamental privacy right to decide. And the unconstitutionality of this third party veto is not cured by the "best interests" standard, a standard without meaning in the context of the abortion decision. (Pages 36-43.)

Third, the statute's requirement that, if one parent refuses consent, a minor must bring judicial proceedings to overturn that refusal is a substantial deterrent to deciding in favor of the abortion choice. Many minors would not undertake such judicial proceedings, especially as the proceedings can only harm the family relationship, whichever way the judge decides on the abortion question. Accordingly, parents who refuse to consent to their daughter's abortion choice have effectively been empowered by the statute to veto it. Moreover, forcing a minor to institute suit against her parents imposes upon her a number of practical and psychological burdens. These burdens will deter many minors from exercising their constitutional right to decide in favor of a legal abortion in Massachusetts, and will force many of them to seek out-of-state or illicit abortions, or to have an unwanted child. (Pages 43-52.)

Fourth, because the face of the statute not only fails to advise parents that they must limit their consideration of their minor daughter's abortion choice to her "best interests", but also suggests by its breadth that parents are free to consider other factors, the statute needlessly increases the likelihood of parental refusals to consent for

improper reasons, and thus increases the likelihood of a minor confronting her parents in court. Increasing the likelihood of such courtroom confrontations with respect to a minor's abortion decision unduly burdens the minor's constitutional right to decide. (Pages 52-55.)

None of these weighty burdens is justified by any of the supposed significant state interests proffered by appellants. The statute works against and sweeps far beyond the state interest in protecting against improvident decision-making, an interest already safeguarded by the Massachusetts common law and statutory mature minor rules, and an interest hardly furthered by a requirement of notice to both parents even when against the minor's best interests, or a provision for judicial override of a mature minor's informed consent. Nor may the statute be justified as "sanctioning" parental consultation, inasmuch as the statute goes far beyond merely requiring parental consultation, but also irrationally requires such consultation even when contrary to the best interests of the minor or the family. Finally, while the state's interest in remedying possible inadequate counselling by some clinics might support a narrowly drawn statute addressed to that end, the statute involved in this case has not even a rational relationship to this interest. (Pages 55-63.)

Equal Protection of the Laws

The statute also denies mature minors the equal protection of the laws because the burdens imposed upon the minor's fundamental constitutional rights are not justified by significant state interests and the statutory classifications are not narrowly drawn to express only the legitimate state interests at stake. (Pages 63-65.)

There is no reasonable basis for the statute's distinction between an adult and a mature minor who has given informed consent. Once a minor is found to be mature

and informed, the state's interest in protecting her from the special consequences of her minority — immaturity and lack of informed understanding — is extinguished. For the state to persist at that point in imposing on the minor the burdens of mandatory parental consultation and potential judicial veto, burdens which would not be imposed on an adult, is without rational basis and so impermissible. (Pages 65-66.)

The statute is also unduly burdensome as compared to the Massachusetts common law mature minor rule, under which a mature minor may consent to an abortion without notifying her parents if her physician determines that such notice is not in her best interests. The additional burdens imposed by the statute do not advance significant state interests which would not be adequately met by the announced common law rule. (Pages 66-68.)

Finally, under the statutory mature minor rule (§ 12F, *supra*), the state impermissibly discriminates between married and unmarried minors and between minors deemed mature by the statute who seek abortions and those who seek other medical care. Section 12F irrationally permits the classes of minors enumerated therein to consent to medical procedures more complicated and dangerous than abortion while requiring such minors to obtain parental or judicial consent in order to obtain an abortion. (Pages 69-71.)

None of the burdensome distinctions discussed above is supported by a "significant state interest", nor are the statutory classifications narrowly drawn to serve only the interests which the state advances in their support. The legitimate scope of the state's interest in assuring that the minor's decision whether to continue or terminate a pregnancy be wisely made is limited to assuring that the minor is mature and informed. The statutory classifications are overinclusive, in that they impose burdens unrelated to an interest in assuring that the minor is mature and informed; at the same time, they are underinclusive in that they do not impose parental notification requirements on the minor who is immature in fact but who wishes to continue her pregnancy to term. Finally, the state may not in the first two trimesters, seek to further its interest in encouraging normal childbirth "by directly restricting a woman's decision whether or not to terminate her pregnancy." *Colautti v. Franklin,* —— U.S. ——, No. 77-891, slip op. at 7 (Jan. 9, 1979). (Pages 71-74.)

Facial Invalidity of the Statute

The district court also properly invalidated the statute on its face. The district court found that the claims of all minors to whom the statute applies, including both mature and immature minors, were properly before the court and so rejected appellants' proposed "as applied analysis". As to both mature and immature minors, the statute is unconstitutional. (Pages 74-78.)

Moreover, there is no savings construction of the statute available, as the statute has been authoritatively construed by the state's highest court. It would have been improper for the district court to have altered the statute's terms, particularly when appellants' proposed savings constructions were specifically rejected by the state court as being inconsistent with the legislative intent. In addition, these proposed constructions would not meet the standard of definiteness required of criminal statutes and statutes which impinge on fundamental rights, nor would they be consistent with general principles of statutory construction. (Pages 78-85.)

Procedural Orders Below

Finally, appellants have not met their burden of demonstrating reversible error in the district court's procedural order concerning discretionary discovery and its order allocating costs. (Pages 85-90.)

Argument.

As construed by the state court, the statute, Mass. G.L. c. 112, § 12S, is plainly unconstitutional under the abortion-related cases decided by this Court. It is now clear, as it was not when this Court first had the statute before it, that in every case the statute requires the consent of both parents or, failing that, notice to them of a judicial hearing — regardless of whether the minor is capable of giving informed consent, and regardless of whether such notice would be contrary to her best interests.[20] *See Attorney General* at 303; *compare Bellotti I*, 428 U.S. at 144, 145. Similarly, it is now clear, as it was not when this Court first had the statute before it, that a minor who is determined by a court to be capable of giving informed consent will still not be allowed to do so, unless a judge determines that her decision is in her "best interests."[21] *See Attorney General* at 303; *compare Bellotti I* at 144, 145.

Despite the state court's draconian construction of the statute, the appellants continue to portray it to this Court, as they did before, as an innocuous and benign piece of legislation. Appellants defend the statute with the recurring plea that it is merely "neutral" (Brief for the Appellants, 29) and protectionist, and serves only the "salubrious" (*id.* at 42) purpose of helping a pregnant unmarried minor decide whether to continue or terminate her pregnancy:

> The statute is neutral on its face and does not discourage the selection of any of the various legitimate alternatives which comprise the abortion decision. It is also inherently neutral in application as a result of its reliance upon the best interest standard. *Id.* at 29.

The statute is thus portrayed as no more than an example of traditional state paternalism designed to protect minors neutrally.

In fact, however, the statute is not neutral on its face, nor would it be neutral in application. The state has classified minors in two groups — pregnant minors who wish to bear a child, and those who do not. Another statute within the same chapter — Mass. G.L. c. 112, § 12F — provides that a pregnant minor of whatever age or level of maturity is conclusively presumed to be capable of giving effective consent to any medical procedure whatsoever, *except* abortion or sterilization:

> Any minor may give consent to his medical or dental care at the time such care is sought if . . . (*iv*) she is pregnant or believes herself to be pregnant . . . .
>
> Consent shall not be granted under subparagraphs (*ii*) through (*vi*), inclusive, for abortion or sterilization.

Thus, a pregnant "immature" minor of ten years of age, to borrow appellants' example (Brief, 11), is authorized to consent to any medical care, including delivery of her child, without consulting her parents or obtaining a court's determination of "her best interests". Conversely, a

[20] The district court called this the "parents' bypass" issue. *Baird III* at 999. It concerns both "mature" and "immature minors".

[21] The district court called this the "judicial override" issue. *Baird III* at 999.

minor of 17 years of age, found by a court to be mature and to have made a reasonable and informed decision to terminate her pregnancy, may not do so without first informing both her parents, and, if *either* objects, obtaining a court decision that the abortion is in "her best interests". Thus, the statutory scheme of chapter 112 insulates one decision — to bear a child — from any parental or state involvement, while burdening the other decision — to have an abortion — with extraordinary parental and state involvement. To label such a statutory scheme "neutral" is to ignore its terms.

Once the fundamental dichotomy of the statutory scheme is bared, appellants' claim that the statute is designed "to serve this 'over-riding consideration' " "that the minor make the choice as wisely as possible" (Brief, 19) rings hollow. The statute surely does "structure the abortion decision making process," as appellants note (Brief, 17-18), but it does so by imposing a series of hurdles only upon the minor's decision (including the mature minor's decision) to terminate her pregnancy, and never upon her decision to continue it. And the related statute — § 12F — removes any doubt there may have been at common law concerning the necessity of consent to medical treatment of any sort for a pregnant minor to bear a child.

Appellants' justification of the statute as a neutral aid to decision making, thus bears no relationship to its actual terms or application. If mandatory parental consultation is an aid to a minor's decision whether to continue or terminate a pregnancy,[22] it is as valuable when the minor's choice is to continue as it is when her choice is

[22] Unquestionably there is an important potential benefit of parental consultation with an unmarried minor concerning her decision whether to continue or terminate her pregnancy. Such consultation is frequently both wise and desirable. But the statute here does not merely encourage parental consultation in most cases.

to terminate. Yet only the minor who wishes to terminate her pregnancy is *compelled* by the statute to involve her parents in the choice. The minor who is willing to continue her pregnancy is not only not compelled by the statute to consult her parents, but under § 12F is excused from consulting them with respect to medical treatment for pregnancy or for anything else (other than abortion or sterilization).

Similarly, if judicial superintendence is necessary to determine whether the minor's decision is truly in her "best interests", then it is as necessary when the minor's choice is to continue the pregnancy as it is when her choice is to terminate. The blunt fact is that the statute does not seek to ensure that the minor choose wisely but rather seeks to control the minor's choice by imposing burdensome restrictions exclusively on the abortion alternative.

The statute, though somewhat more sophisticated in design than some previously considered by this Court, is in substantial measure another anti-abortion statute. If enforced, it will cause some minors to bear unwanted children, and will lead others to seek dangerous illegal abortions. *See YWCA* v. *Kugler,* 342 F. Supp. 1048, 1074 (D. N.J. 1972), *aff'd,* 493 F. 2d 1402 (3d Cir.), *cert. denied,* 415 U.S. 989 (1974).

I. The District Court Correctly Concluded that the Massachusetts Statute Unduly Burdens a Minor's Constitutional Right to Decide Whether to Terminate Her Pregnancy.

The applicable test for a statute such as the one before this Court is whether " 'it unduly burdens the right to seek an abortion'." *Maher* v. *Roe,* 432 U.S. 464, 473 (1977), quoting *Bellotti I,* 428 U.S. at 147. Appellants' attempted restatement (Brief, 27) in terms of "deleterious distor-

tion in a pregnant minor's decision making process" contributes nothing to the analysis.

Of course, the constitutional right involved is the "right to seek an abortion." *Bellotti I, supra.* This right, a right to choose and decide, is plainly what the district court meant by its shorthand reference (*Baird III* at 1003) to "a basic constitutional right to an abortion."[23] It is a right that extends to minors as well as adults. *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52, 74-75 (1976).

Manifestly, the statute imposes some burden on the minor's right to decide. It cannot be said here, as it was said in *Maher,* that the state "has imposed no restriction on access to abortions that was not already there." *Maher* at 474. The statute requires that in *all* cases *all* minors (not married or previously married) who choose to terminate their pregnancy must obtain the consent of *both* parents, or sue their parents and obtain the consent of a state court judge; in *all* cases *both* of the minor's parents must be notified of the judicial hearing and given an opportunity to be heard, *even where that is against the minor's best interests;* the judge can override a mature minor's informed choice; indeed, the judge can override the informed choice of a mature minor *and* the concurrent choice of one of her parents. These are very real burdens in fact, as the district court specifically found. *Baird III* at 1001-1002; *Baird I* at 853-855. Appellants do *not* challenge any of these findings, or any other findings, as "clearly erroneous", Fed. R. Civ. P. 52, and, therefore, appellants' suggestion (Brief, 20) that the statute imposes no burden at all is groundless.

[23] This shorthand expression was similarly used by the dissenting judge in the district court. *Baird III* at 1016 ("right to an abortion"). Similar language has been used by, for example, Mr. Justice Stevens, dissenting in *Carey* v. *Population Services Int'l,* 431 U.S. 678, 713 (1977) ("right to abort").

Appellants apparently accept that a minor female, like an adult female, has a constitutional "right to make the abortion decision." Brief for the Appellants, 26. Were the statute designed only to ensure the minor's capacity to make that decision, then, absent other unrelated objections, the statute might not be burdensome in a constitutional sense. Capacity to choose is inherently a legitimate prerequisite of the constitutional right of privacy to make the intimately personal decision whether to continue or terminate a pregnancy.[24] But the statutory procedure for mandatory parental notice and opportunity to litigate is unrelated to the question of capacity and, contrary to appellants' suggestion (Brief, 32-33), is not "an appropriate means . . . for promoting sound decision making." The statutory procedure is, in fact, an oblique denial of the fundamental constitutional right to decide consistently recognized by this Court.

A. *The Statute Is Unduly Burdensome in that It Requires Parental Consent or Notice to Both Parents and an Adversary Judicial Hearing in Every Case.*

1. *The requirement of giving notice in every case is unduly burdensome.*

In *Bellotti I* (at 143), appellants argued to this court that the statute "was capable of a construction that would withstand constitutional analysis" in that, among other things, the statute did *not* require parental consultation in all cases but permitted it to be bypassed in the case

[24] Conversely, if a woman, regardless of whether she is above or below majority age, has that capacity to choose, the state may not override her constitutional right to do so by delegating the decision to another. Hence, as the state court noted, the case for a mature minor rule has "particular force" with respect "to a medical procedure to which a minor may be entitled by constitutional right." *Attorney General,* 360 N.E. 2d at 296.

of a mature minor and also in the case of an immature minor if an abortion was shown to be in her best interests.

> The picture thus painted by the respective appellants is of a statute that prefers parental consultation and consent, but that [1] permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, [2] permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests. The statute, as thus read, would be fundamentally different from a statute that creates a "parental veto". *Bellotti I* at 145.[25]

The state court, however, flatly rejected the innocuous picture of the statute which appellants attempted to paint.

> Parental consultation is required in every instance where an unmarried minor seeks a non-emergency abortion. . . . The parents, if available, must be notified of the court proceeding, and must be allowed to participate in it. *Attorney General* at 303.

Thus, the statute does not merely prefer parental consultation in most cases; it requires that in all cases both parents must be informed and (if they do not consent) invited to oppose in court the minor's decision to terminate her pregnancy.[26]

[25] Mr. Justice Stewart, concurring in *Danforth* and citing *Bellotti I*, also noted that a "materially different constitutional issue" would be framed were the statute construed to require parental consultation and consent "in most cases" while recognizing that in come cases "the minor is mature enough to give an informed consent without parental concurrence . . . ." *Danforth* at 91.

[26] Requiring the minor to name her parents as defendants in the superior court also, as the district court found, tends to destroy the family relationship and places a heavy burden on the minor. Whatever the outcome of the court hearing, the minor "is in a no-win situation." *Baird III* at 1001-1002.

The requirement of notice and an opportunity to litigate applies without regard to whether the minor is "mature" — that is, capable of giving "effective consent for termination of her pregnancy" (*Danforth* at 75; majority opinion) or "informed consent" (*id.* at 91; concurring opinion). Where a woman, albeit chronologically a minor, can give "informed consent,"[27] requiring her nevertheless to notify both of her parents and obtain their consent or else litigate with them to uphold her choice, is surely a great burden in any case, and often will be a psychologically devastating burden.

Parental notice and opportunity to litigate are required by the statute even if the minor's best interests would be served by her parents not being informed or consulted.[28] A judge who so finds is still not permitted to bypass the notice requirement — even for a "mature" minor. Despite the claims of appellants and intervenor-appellant, there can be no wisdom in a requirement that both parents be notified, even when, by hypothesis, the notice itself is factually and objectively against the minor's best interests. The statute requires notice even when, for example, a judge has concluded that a parent, if notified, is likely to harm or even kill the minor or the boy involved with her

[27] The state court recently declined to adopt any definition of the term "informed consent". *Schroeder* v. *Lawrence*, Mass. Adv. Sh. (1977) 286, 289-90, 359 N.E. 2d 1301, 1303. In *Danforth*, this Court was satisfied with a definition of informed consent in terms of "the giving of information to the patient as to just what would be done and as to its consequences." *Danforth* at 67 n.8.

[28] In both *Danforth* and *Bellotti I*, this Court implicitly recognized that in some instances it is in the minor's best interests, be she mature or not, that her parents not be consulted about the abortion decision.

pregnancy or both. This kind of requirement can only be described as "irrational and perverse." *Carey* at 715 (Stevens, J., concurring).

That mandatory parental consultation would work harm in a significant number of cases is clear from the district court's findings. As the district court found, there are a broad range of reasons why parental consultation would not be consistent with a minor's best interests.

> Parents, physically or emotionally unwell, may be injured by the shock, thus causing the minor deep feelings of guilt. Some parents are child abusers; others at least may become actively hostile on such disclosure. . . . [A]n appreciable number of parents are not supportive. These include not only those who would inflict physical harm, but parents who would insist on an undesired marriage, or on continuance of the pregnancy as punishment. *Baird III* at 1001.

Similar findings were made by the district court after the original trial. *Baird I* at 853-854.

Thus, the statute's absolute requirement that parents be notified of their daughter's choice of abortion and of their right to oppose it in court conflicts with the specific findings which were made in this case. Yet the statute precludes independent judicial assessment of whether such notice is in the minor's best interests. "To this extent the state is ruling what is to a minor's best interests, instead of consigning the question to an unfettered tribunal. Thus it has diminished the only feature of the statute that could save it from the Court's ruling in *Danforth.*" *Baird II* at 856.

2. *The requirement of giving notice to both parents is unduly burdensome.*

The undue burden of the requirement of giving notice to (or obtaining the consent of) both parents, rather than

one, is clear and was implicitly recognized by the district court, even though it was not cited expressly as a matter separate from the burdensomeness of the requirement of notice in all cases. Each of the examples the district court gave (*Baird III* at 1001) of reasons for bypassing parental notice could involve one parent or both. Obviously, requiring notice to both parents increases the likelihood that a minor will encounter one unsupportive parent with respect to whom notice would be contrary to the minor's best interests. There was ample evidence of cases where it was only one of the two parents who should not be notified.[29] Plaintiff Mary Moe [I] herself asserted, as a reason for not wanting to tell her parents of her pregnancy, a certainty that one parent, not both, "would take some physical action against the boy." *Baird I* at 850.

In each post-trial decision, the district court expressly commented that the additional burden of notice to both parents instead of one was unsupported by any reason or justification. "We find nothing about abortions that requires the minor's interest to be treated differently from other medical and surgical procedures, as to which we find the custom to be to proceed under the consent of one parent." *Baird I* at 852. "The statute does not purport simply to codify what we find to be accepted medical practice in Massachusetts hitherto, namely that certain medical procedures involving minors require the consent of a parent. This statute creates a special, unique exception by requiring the consent of both parents." *Id.* at 855. "Nor, parenthetically, has any reason been advanced for attaching to abortion the special requirement of dual con-

[29] Plaintiffs' expert Dr. Nadelson testified that she often encountered cases where the minor and one parent jointly agreed that an abortion was the correct decision and insisted that the other parent not be told. 2 App. 147-148. *See also* 2 App. 19, 38. The statute apparently requires both parents' consent even where the parents are separated or divorced.

sent by both parents." *Baird III* at 1004 n.9. Where accepted medical practice is to obtain the consent of one parent when consent is deemed necessary (e.g., for an immature minor), the requirement of getting both parents' consent or giving them both notice of a judicial hearing is unduly burdensome, without regard to whether the minor is "mature" or "immature".[30]

B. *The Statute Is Unduly Burdensome in that Its "Judicial Override" Provision Creates an Unconstitutional Third Party Veto of a Mature Minor's Decision.*

1. *The statute's "judicial override" provision is a third party veto.*

This Court's remand in *Bellotti I* was predicated in part on appellants' suggestion "that the last paragraph of [the statute] preserves the 'mature minor' rule in Massachusetts, under which a child determined by a court to be capable of giving informed consent will be allowed to do so." *Id.* at 144. Appellants argued that once an informed consent by a mature minor was found, the court's function would be complete, and thus led this Court to hypothesize a construction of the statute that "permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion". *Bellotti I* at 145.[31] However, the state court has rejected that construction of the statute:

> Unless a contrary conclusion is compelled constitutionally, *we do not view the judge's role as limited to a determination that a minor is capable of making, and has made, an informed and reasonable decision to have an abortion.* . . . [I]n circumstances where he determines that the best interests of the minor will not be served by an abortion, the judge's determination should prevail assuming that his conclusion is supported by the evidence and adequate findings of fact. *Attorney General,* 360 N.E. 2d at 293 (emphasis added).

The district court referred to this power to overrule a mature minor's decision to terminate her pregnancy as a "judicial override", and condemned it. *Baird III* at 999, 1003.

The provision for judicial override of a mature minor's informed decision imposes another unduly burdensome restriction on the constitutional right to decide. If the privacy right is to survive, the decision — "a woman's decision whether or not to terminate her pregnancy"[32] — must be protected "from unwarranted governmental in-

[30] For the mature minor, the both-parent requirement is a cumulative burden: it involves both parents, whereas neither should be involved. For the immature minor, however, the both-parent notice requirement has particular significance because it is not only burdensome in itself, but it is what exposes the immature minor to the risk of being forced to give notice against her best interests. By definition, the immature minor cannot give effective consent herself, but must have someone give such consent for her. According to Massachusetts medical practice and custom, as found by the district court, this consent, in the absence of the statute, would usually be given by one parent. The both-parent notice requirement prevents the immature minor from proceeding according to this custom, and also exposes her to the separate burden of having to give notice to a second parent even when one parent has consented and the notice would be against the minor's best interests.

[31] Similarly, Mr. Justice Stewart, concurring in *Danforth* and citing *Bellotti I*, noted that one feature of the statute which would make it materially different from a parental veto would be provision for a "judicial determination that the minor is mature enough to give an informed consent without parental concurrence *or* that abortion in any event is in the minor's best interest." *Danforth* at 91 (emphasis added).

[32] *Roe* v. *Wade,* 410 U.S. at 153.

trusion."[33] Accordingly, in *Danforth,* this Court struck down requirements of spousal and parental consent, holding that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." *Id.* at 74.

This privacy right does not "come into being magically only when one obtains the state-defined age of majority. Minors . . . possess constitutional rights." *Danforth* at 74. But because the right to decide assumes the capacity to understand the decision and the alternatives involved, a state intrusion solely to insure "awareness of the decision and its significance" is not unwarranted. *Danforth* at 67 (upholding a requirement of consent by the woman herself). Not every minor can be made sufficiently aware of the decision and its significance to make the decision herself.[34] But for those who can, the fundamental right of privacy to decide bars the state from delegating it to another.

The statute, as construed by the state court, is not only burdensome,[35] but provides for a forbidden veto in that it expressly authorizes the judge to override the informed

[33] *Eisenstadt* v. *Baird,* 405 U.S. 438, 453 (1972).

[34] "We . . . [do] not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy. *See Bellotti* v. *Baird,* post, p. 132." *Danforth* at 75. In Note, *The Mental Hospitalization of Children and the Limits of Parental Authority,* 88 Yale L.J. 186, 201-202, 206-209 (1978), it is suggested that a child becomes capable of intelligent, autonomous choice, constitutionally protectable, at about the time of adolescence or age 14. Psychological evidence is reviewed at 207 n.109.

[35] The district court found that "it is a highly traumatic experience for a mature minor to be refused a desired abortion." *Baird III* at 1003.

decision of a mature minor to terminate her pregnancy.[36] The district court unanimously agreed that the judicial override provision was unconstitutional. The majority, correctly applying the necessary logic of a privacy right to decide, observed that the state's power to limit this right "should extend only to protect the minor from the special consequences of her minority — immaturity, and the lack of informed understanding." *Baird III* at 1003. Instead, the statute disregards the minor's maturity and her informed understanding and permits a third party to veto her decision. Even the dissenting judge in the district court found the judicial override provision "to be self-contradictory and incapable of rational application", and observed that the decision is left "to the arbitrary will of the judge." *Baird III* at 1015.

Appellants respond by pointing to the language in *Danforth* which prohibits the state from giving "a third party an absolute, and possibly arbitrary, veto over the decision . . . to terminate", *Danforth* at 74, and by focusing on the word "arbitrary". Appellants say (Brief for the Appellants, 28) that a judicial determination simply cannot be arbitrary — presumably meaning, in light of *Danforth,* that it cannot "possibly" be arbitrary. There are at least three fallacies in this unusual argument. First, appellants ignore the analytical basis for *Danforth's* prohibition of a third party veto. That basis is not the possibility of arbitrariness; *Danforth* sanctions "rational" vetoes no more than arbitrary ones. Rather the basis is the funda-

[36] As construed, the statute permits the judge to overrule a minor's decision which is both "informed and reasonable". *Attorney General* at 293. If a judge can find a minor's decision to terminate her pregnancy not only to be informed but also to be as reasonable as the decision to continue, yet override the minor's decision and compel her to accept continuation, the judicial override provision is even more indefensible.

mental incompatibility of a third party veto with the concept of privacy — that the decision to continue or terminate is too private and personal for anyone but the woman to make. Second, it denies reality to argue that there is no possibility of any state court judge making an arbitrary decision or that, given the discretionary nature of the decision, an arbitrary trial court decision could never withstand appellate review.[37] Third, the possibility of unprincipled, if not wholly arbitrary, decisions has been increased beyond the inherent fallibility of any judicial system by the way the judicial override power in the statute was defined, or more accurately, undefined by the state court. According to that court, the judge may override a "reasonable" decision by an informed minor, and in so doing, may consider "all relevant views presented to him." *Attorney General* at 293. Accordingly, the judge is free to conclude that, although the minor's choice of termination is reasonable, the choice of continuation is preferable and the minor should be compelled, therefore, to continue her pregnancy and have a child. In so doing, the judge is free under the statute as construed to consider such views as, for example, that it is in the minor's "best interests" that she not violate the moral or religious principles of her parents or the religion in which they have raised her.[38]

Any decision which overrides a mature minor's informed and reasonable decision is indeed "arbitrary", not always in the sense of capricious, but surely in the sense of with-

[37] Indeed, there is an air of fantasy in supposing that an unmarried pregnant minor who desires an abortion will initiate a trial court proceeding, much less undertake an appeal, if she can possibly find her way out of state or to an illicit (and perhaps unqualified) abortionist instead. *See* 2 App. 31-32.

[38] *See* Brief, Amici Curiae of Americans United for Life, et al. at 8 (arguing for parents' right to persuade child "according to their family moral and theological principles").

drawing from her the right to decide between alternatives. It is also arbitrary in the sense described by the dissenting judge in the district court: "[t]he lack of any ascertainable principle to guide a judge in differentiating between concepts of what is a reasonable and informed course . . . leaves the resolution of the problem to the arbitrary will of the judge." *Baird III* at 1015. The mere existence of a third party's power to veto one decision and choose the other — even if the veto is not exercised — squarely conflicts with the concept of a privacy right to decide for oneself.

2. *The "best interests" standard does not save the third party veto created by the "judicial override" provision.*

The "best interests" standard which the state court read into the judicial override provision does nothing to cure the statute's constitutional defect of creating a third party veto. Although the "best interests" standard is well understood in other contexts (for example, in custody dispute cases), in the peculiar circumstances of the pregnancy continuation/termination decision, the "best interests" standard is meaningless.[39]

There was no evidence or suggestion, and the state court made no suggestion, of any recognized criteria or objective indicia which could guide a court's determination of whether to veto a mature minor's informed decision to terminate her pregnancy. Thus, there is too great a risk

[39] The state court's permissive phrasing in discussing the "best interests" standard makes it even more meaningless: "the judge *may* [— not shall —] give consent to an abortion where it is shown that, in spite of the disapproval of one or both parents, the best interest of the minor will be served". *Attorney General* at 293 (emphasis added). The language of the state court decision thus appears to confer discretion not only to ignore her informed and reasonable choice but also her "best interests".

of an unprincipled, or merely mistaken, override of the minor's decision. It is difficult, if not impossible, to imagine a case where objective criteria would support a conclusion that it would be in the minor's "best interests" for a judge to override her mature and informed decision to choose an abortion,[40] and the state court offered no example of circumstances where a minor's "best interests" would justify a judge's overriding her decision. For the same reasons, appellate review would almost certainly be limited to an "abuse of discretion" test and could not be meaningful.

Moreover, available objective criteria suggest that, from the standpoint of physical and mental health, *compelling* a minor to bear a child is never in her "best interests". *See Baird III* at 1004 (findings as to psychological and physical risks). As to physical risks, the critical fact is that a first trimester abortion is usually safer, and especially so for a minor, than continuing a pregnancy.[41] The facts concerning psychological risks are equally graphic. The

[40] There was no evidence in this case, and neither appellants nor intervenor-appellant have ever suggested that any exists, which indicates that it ever could be in the best interests of a mature and informed minor to carry a pregnancy to term *against her wishes.*

[41] For any woman, risk to life from a legal, first trimester abortion is significantly less than the risk of bearing a child. *Roe* v. *Wade,* 410 U.S. at 149-150. The contrast is more stark in the case of a minor, for the risk to life of bearing to term increases dramatically as the age of the mother decreases. 2 App. 29. The death rate from the complications of pregnancy, birth and delivery is *sixty percent higher* for women who become pregnant before they are 15 than women in their early twenties, and the risk of death for 15 to 19-year-olds is 13 percent higher than for women in their early twenties. Toxemia has been cited as a "special hazard" of pregnancy among the very young because of stress of such early pregnancies, poor diet and inadequate physical development. App. Exhibit 2 at 23. *See also* Note, *The Minor's Right to Abortion and the Requirement of Parental Consent,* 60 Va. L. Rev. 305, 307 n.11, 308 (1974); Menchen, *The Health and Social Consequences of Teenage Childbearing,* 4 Fam. Planning Perspectives 45 (1974).

younger the mother, the greater the emotional trauma of bearing and raising an unwanted child. "[A]n unwanted pregnancy is sometimes a social and emotional tragedy to an adult and . . . when the mother herself is a child it is even worse." 2 App. 7. This is especially so where she is unmarried, has not completed her education, and has little likelihood of being able to provide for herself or any children she may have.[42] There is a higher percentage of psychological problems among unmarried minors who elect to continue an unwanted pregnancy than among those who elect to terminate it. 2 App. 102-103, 114.

Finally, as this Court has recognized, the abortion decision is medical in nature. *Roe* v. *Wade,* 410 U.S. at 166. Participation by a physician is necessary. When the minor has the capacity to understand and consent to the abortion decision, and when the determination of this capacity and understanding has been made by a physician who can assess whether the minor understands its medical aspects, the provision for a further decision by a judge applying a "best interests" standard is simply an invitation for an impermissible third party veto.

C. *The Statute Is Unduly Burdensome in that the Judicial Proceedings It Requires Would Deter the Minor's Exercise of Her Constitutional Right to Decide.*

Were there no judicial remedy, there would be no question that the statute's requirement of obtaining both par-

[42] Early motherhood in America's present economic structure is one of the most certain methods to ensure a lifetime of dependency on welfare payments for the mother and her children. *See* 1 App. Exhibit 2, 26-27 (correlating teenage motherhood with poverty and welfare). *See also* Note, *Minors and Contraceptives: The Physician's Right to Assist Unmarried Minors in California,* 23 Hastings L. J. 1486, 1489 (1972), citing Hearings on S. 2108 and S. 3219 before the Subcom. of the Comm. on Labor and Public Welfare, 91st Cong., 1st and 2nd Sess. 69 (1970); and App. Exhibit 2, at 18.

ents' consent would be an impermissible parental veto. *Danforth,* 428 U.S. at 74. The parental consent requirement here was described by the state court as "by analogy to the legislative process, a veto which may be overridden." *Attorney General,* 360 N.E. 2d at 294. However, because the judicial proceedings prescribed are so burdensome to minors and would deter many of them from litigating against their parents to defend their preference, there is no real judicial remedy and parents have effectively been given an absolute veto, albeit *de facto* and not *de jure.*

In this case, the statute's requirement that, if one of a pregnant minor's parents refuses to consent to her abortion decision, the minor must go to court to litigate their refusal is in fact deterrent to abortion choice. The district court found that "the burden of seeking a court order — is a heavy one", *Baird III* at 1001, even assuming, as the district court did, good faith effort by state court personnel and court judges.[43] The district court reasoned as follows:

> Plaintiffs' expert credibly and without contradiction testified that court proceedings over such a personal matter, even if conducted in the most benign manner, would be "severely detrimental to a teenager, particularly since she had just met with her parents' disapproval, which is difficult enough." Further, she credibly testified that many minors would not go to court, especially if it had to be against her parents, but rather would resort to illegal and frequently dangerous abortions. But assuming again in the statute's favor that the minor would initiate the proceedings, defendants' own expert expressed the opinion that if she did go to court and was successful, it would be likely to destroy what was left of the family relationship. The minor accordingly, is in a no-win situation. *Baird III* at 1001-1002.

[43] *See* 1 App. 153.

The Court of Appeals for the Seventh Circuit, reviewing a similar statute requiring judicial proceedings in default of parental consent concluded that it "places an undue burden upon [minors]. [Judicial] proceedings, with parents present as opposing parties, would certainly destroy what was left of the family relationship." *Wynn* v. *Carey,* 582 F. 2d 1375, 1388-1389 (7th Cir. 1978).

Neither the district court nor the court in *Wynn* v. *Carey, supra,* reached this issue, but it is important to note that the particular court proceedings contemplated by the statute not only fail to cure the unconstitutional parental veto but themselves add an undue burden. It is submitted that, to borrow the words of the district court, "the entire concept of a court proceeding to remedy the unconstitutionality of the parental veto, as struck down in *Danforth,* is but an ignis fatuus, and itself imposes too great a burden upon the exercise of the minor's rights." *Baird III,* at 1002. *See Zablocki v. Redhail,* 434 U.S. 374, 387 (1978) (court proceedings burdened exercise of right to marry).

1. *Psychological deterrents.*

If, as the statute contemplates, a minor must sue her parents and they must be notified and invited to come to court to oppose her choice, the deterrent effect on her attempting to exercise her legal right to decide in favor of abortion is substantial. Inasmuch as "many minors would not go to court . . . but rather would resort to illegal and frequently dangerous abortions" (*Baird III* at 1001-1002),[44] the statute surely works an "unduly burden-

[44] "If [minors] are unable to get parental consent . . . they will seek help elsewhere and they will go to some of the unqualified centers or criminal abortionists . . . . [T]he law is being

some interference with her freedom to decide whether to terminate her pregnancy." *Maher* v. *Roe,* 432 U.S. at 474.

Moreover, even for the minor prepared to accept parental notification and possible parental confrontation as the price of her decision, the process of going to court to seek judicial approval of that decision will surely be a traumatic experience. For most lay persons, especially the young, the solemnity and formality of a court and its proceedings, deliberately reinforced by building design and courtroom rituals, are awesome and intimidating. For many minors, such a proceeding will be their first exposure to a court in their lives. They will be seeking permission from a public official to make a decision which is so profoundly private as to require constitutional protection. And their choice may still be rejected by a judge. A pregnant minor, already at odds with her parents and confronted with a risk that her decision may still be overturned by yet another person—a stranger at that—may well abandon any attempt to obtain a legal abortion in Massachusetts. At the very least, having to initiate such a court proceeding cannot enhance the quality of her "sound decision making" (Brief for the Appellants, 33).

Finally, the prospect of litigating against her parents obviously will deter a minor's free choice. Any fear the unmarried minor may have of a violent or punitive reaction by her parents to the fact of her pregnancy or to her choice of abortion, or both, will inevitably be heightened by the requirement of instigating a lawsuit against them. Whatever the grounds for her parents' refusal to consent, the minor must go to court to overturn it. In court, one parent who consents may well be aligned with the minor against the other parent. Such a result can be

broken all over the country where there is such a law." 2 App. 31-32.

devastating to the entire family relationship.[45] A minor who perceives this risk of a traumatic family break, as most surely would, may well conclude that a court proceeding would be simply too damaging to the family.

2. *Procedural difficulties.*

On the record in this case, there is no basis for an assumption that judicial proceedings under the statute will be "nonburdensome". *Bellotti I* at 145. The state court has so far declined to prescribe any rules for such proceedings, saying that this is province of the state trial court (the "superior court") which will hold those proceedings. *Attorney General* at 297-298. Only an expectation is offered: "we anticipate that the Superior Court, aided by the clerks of court and the Attorney General, will take the necessary steps to implement the necessary procedures." *Id.* at 298. The absence of specific rules or safeguards built into the statute itself was held by the Court of Appeals for the Seventh Circuit to be one constitutional infirmity of a similar statute. *Wynn* v. *Carey,* 582 F. 2d at 1389.

At present, therefore, a proceeding under the statute is simply an action "of a civil nature" in the Massachusetts superior court, and governed by the Massachusetts Rules of Civil Procedure.[46] It must be commenced with a complaint, and process must be duly served by one of the prescribed methods. Mass. R. Civ. P. 2-4. Presumably, the minor has the burden of going forward to present "evidence" as to her best interests and the burden of persuasion as well.

[45] 2 App. 147-148, 422, 426, 428.

[46] These rules are substantially parallel to the Federal Rules of Civil Procedure. *Rollins Environmental Services, Inc.* v. *Superior Court,* 368 Mass. 174, 179-180, 330 N.E. 2d 814, 818 (1975).

A related cause for concern is the minor's need for legal assistance. The state court recognized this need and held that an indigent minor is entitled to have counsel appointed for her. *Attorney General* at 301. However, the appointment must be by a judge, so the minor must somehow get before that judge (*in camera,* if her anonymity is to be protected) to have counsel appointed. Because Legal Services Corporation attorneys are not available,[47] a minor will be "required to navigate at least the initial stages of a judicial procedure either on her own or with private counsel. Yet, it is obvious that private counsel will be beyond the resources of most teenagers." *Wynn* v. *Carey,* 582 F. 2d at 1389 n.28. The state court offered no guidance or judicial rule as to how a minor could obtain counsel in order to go to court in the first place.

3. *Delay and anonymity.*

Speed is, of course, critical in the abortion context. This Court, in the first appeal, noted appellants' claim that judicial proceedings "would be . . . speedy". *Bellotti I* at 144-145. Delaying the abortion decision or its effectuation can cause psychological and medical problems, especially as the minor approaches the end of the first trimester. *Baird I* at 853.

The state court also recognized the importance of speed in the abortion context and expressed an expectation of "prompt resolution" of any judicial proceeding. *Attor-*

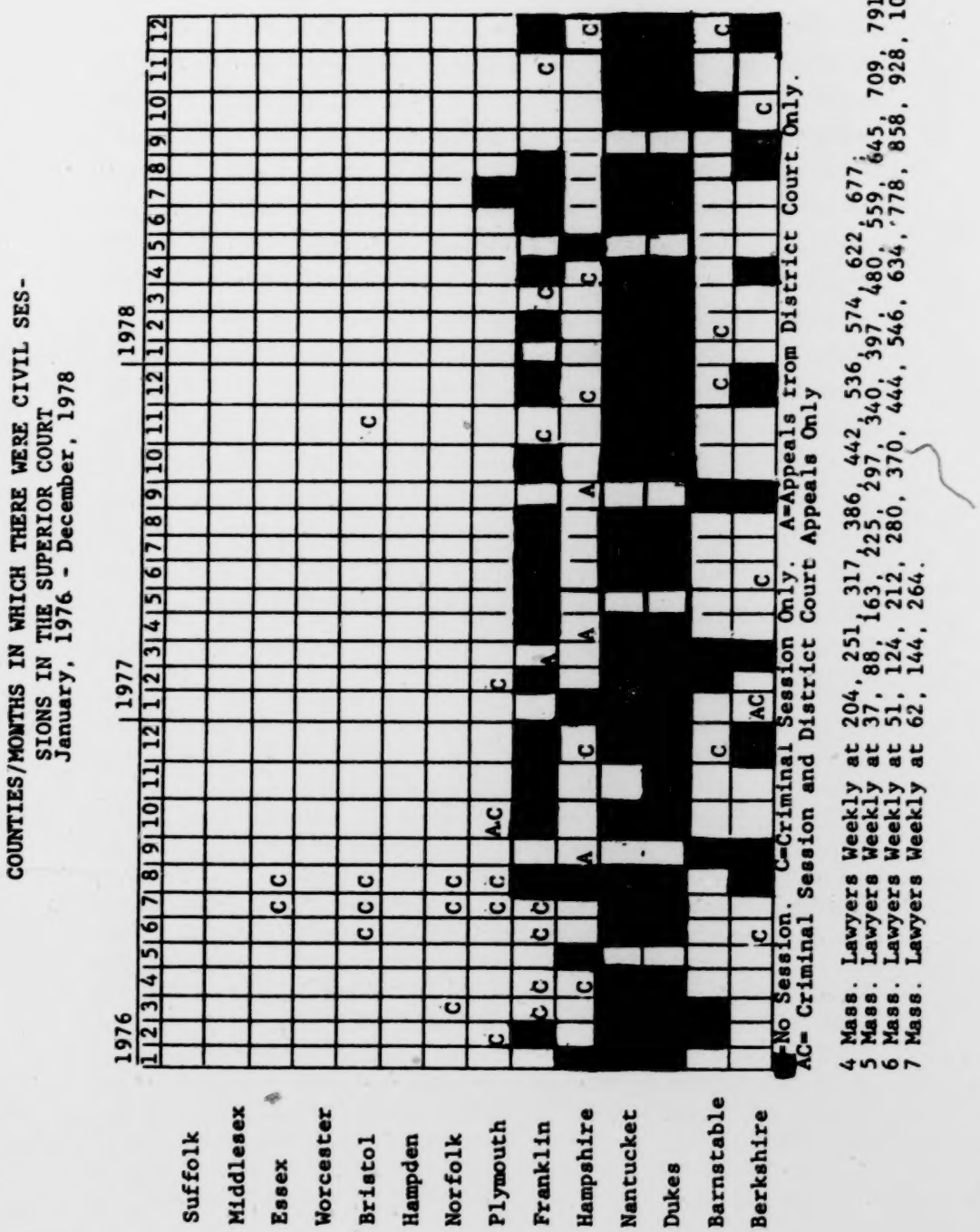
[47] *See* 42 U.S.C. § 2996f(b)(8) (prohibiting the use of Legal Services Corporation funds where an individual seeks to procure a non-therapeutic abortion) and 45 C.F.R. § 1614.5(b) (barring the provision of legal services, at least without a court order, to a juvenile in proceedings against the parents to secure benefits or service). The Massachusetts statute requires that parents be named as defendants or respondents and notified in such a proceeding except where they cannot be located.

ney General at 298. However, the structure and organization of the Massachusetts court system, and the multiple procedures suggested by the state court, necessarily limit the availability and speed of any such judicial proceeding. First, notwithstanding the state court's observation that "hardly any person in the Commonwealth is more than one or two hours' travel from a court house where a Superior Court judge is available to process an application under" the statute, *id.,* the superior court sits only in the shire towns of the state's fourteen counties, Mass. G.L. c. 212, § 14, and many of those counties do not have continuous court sessions throughout the year.[48] When the local county court is not in session, a pregnant teenager will be forced to travel to Boston (Suffolk County) for a hearing.[49] A trip to Boston is a matter of considerable distance and expense for a minor living in, for example, Provincetown, at the tip of Cape Cod; Provincetown is in Barnstable County, which has had no court sessions for two-thirds of the year during the last three years.[50] Second, the state court's decision

[48] See chart on following page. When there are no court sessions, there is no judge in the courthouse. The state superior court judges "ride circuit" and are not assigned to any county. Mass. G.L. c. 211B, §§ 2, 9; c. 212, § 14A.

[49] Massachusetts Superior Court Rule 44 provides that where there are no civil sessions in a county superior court, cases from the county may be heard, after some rather technical preliminary maneuvering, in Suffolk County. (In the three western-most countries, the hearing can be in Springfield instead.) In such a situation, the minor presumably would have to perform all the preliminary steps on her own before getting to see a judge in Suffolk County to get court-appointed counsel.

[50] In discussing the availability of abortion facilities, the state court stated that no one can seriously maintain that a "fundamental right [may] be denied in Worcester County because it remains available in Suffolk or Barnstable." *Framingham Clinic, Inc.* v. *Southborough,* Mass. Adv. Sh. (1977) 1857, 1867, 367 N.E. 2d 606, 611.



suggests that at least *two* court hearings will normally be required for a minor to obtain a judicial determination of her case on the merits. The first will be a preliminary hearing before a judge to determine, in his discretion, whether to appoint counsel or a guardian *ad litem* for the minor. Then, "perhaps at a somewhat later date" (*Attorney General* at 298), the minor will be required to participate in an adversary proceeding against her parents to determine whether the judge will authorize the abortion. A judicial proceeding that requires multiple court appearances, and which may, in addition, require a minor to make multiple trips over long distances, plainly fails to qualify as "speedy and nonburdensome". *Bellotti I* at 145.

In the first appeal, this Court also considered it relevant whether the proposed judicial procedure "would ensure anonymity." *Bellotti I* at 145. A pregnant minor seeking judicial consent to an abortion must sacrifice her anonymity at least to the extent of approaching court personnel for initial help. This may well cause her to doubt whether her situation will remain anonymous. For example, a pregnant minor residing in Nantucket, Massachusetts (population 3774 [51]), who would have to file her complaint before the superior court in the Nantucket County courthouse located in Nantucket,[52] might well be deterred by the prospect of disclosure of her condition — not to mention the fear of possible "leaks" to others.

In sum, it is evident that procedures under the Massachusetts statute are likely to deter a pregnant minor's

[51] U.S. Bureau of the Census, Census of Population: 1970, Vol. 1, Characteristics of the Population, Part 1, U.S. Summary-Section 1, Table 31.

[52] See Mass. G.L. c. 223, § 1 with respect to requiring venue in the county of the minor's home.

exercise of her constitutional right to decide. As the Supreme Court of Washington has stated:

> Even if juvenile court intervention were established and automatic, the delays and costs inherent in litigation themselves would comprise an unworkable burden. Minor women unwilling to add litigation against their parents to their already acute personal difficulties would gain little from the possibility of court intervention. And even those who were sufficiently determined to go to court would find the costs of publicity, delay, and anxiety substantial. *State* v. *Koome,* 84 Wash. 2d 901, 906, 530 P. 2d 260, 264 (1975).

Accordingly, the requirement that a pregnant minor institute court proceedings against her parents in order to obtain an abortion will surely deter many such minors from exercising their constitutional right to choose. The proceedings prescribed by the statute here, even assuming adoption by the state court of rules to mitigate the burdensomeness of litigation, but surely in the absence of such rules, will have such a deterrent effect and should be recognized as a significant burden on a minor's exercise of her constitutional rights. *Cf. Cleveland Bd. of Educ.* v. *LaFleur,* 414 U.S. 632, 640 (1974) (restrictive maternity regulations could operate "to penalize the pregnant teacher for deciding to bear a child").

D. *The Statute Is Unduly Burdensome in that Its Lack of Guidance to Parents Needlessly Increases the Likelihood of Courtroom Confrontations between Minor and Parents.*

Another distinct burden is imposed by the statute in that its lack of guidance to parents as to the basis on which they may withhold their consent needlessly in-

creases the likelihood of a minor having to confront her parents in court. Although the district court has never held that the burden of going to court is *per se* unconstitutional, it has repeatedly found that the burden is heavy and substantial. *Baird III* at 1001; *Baird I* at 856. Thus, the district court correctly observed that "anything that needlessly and incorrectly increases the likelihood of [having to go to court in opposition to her parents], imposes a burden that is constitutionally impermissible." *Baird II* at 856. The district court's discussion of what it called "formal overbreadth" (*Baird III* at 1004-1005) must be read in the context of its underlying conclusion that needlessly increasing the likelihood of courtroom confrontations between minor and parent is unconstitutionally burdensome.[53]

The state court held that parents must limit their concern exclusively to what will serve the minor's best interests. *Attorney General* at 292.[54] However, there is "no

[53] The district court said in this discussion "we regard it essential that the limited scope of the issue confronting parents, when considering whether to consent, be brought home as forcefully *and precisely* as possible, to minimize the incidence of improper refusals." *Baird III* at 1004 (emphasis added). Accordingly, the district court described the text of the statute as having a "chilling effect" — not, obviously, in the sense of first amendment doctrine as appellants seem to suggest (Brief, 54), but in the sense of chilling minors' rights by increasing the "incidence" and the likelihood of improper refusals, and thus increasing the likelihood of courtroom confrontations between parent and minor. *See M.S.* v. *Wermers,* 557 F. 2d 170, 176 (8th Cir. 1977) (in suit by female minor challenging county clinic parental consent requirement for minor's access to prescription contraceptives, mandatory parental notice "has had an obvious chilling effect upon [minor's] efforts to vindicate her constitutional rights").

[54] Of course, as the statute requires the consent of both parents, it is important to remember that a minor's parents may very well disagree between themselves as to whether an abortion is in

penalty if a parent does not apply the proper standard in deciding whether to consent," *id.* at 293; and as a practical matter, there is no way to prevent parents, or one parent, from withholding consent to a minor's decision in favor of abortion for any reason, including an impermissible reason. The text of the statute suggests no limitation of the parents' considerations to the minor's best interests, in deciding whether to grant or withhold their consent. "It would be only natural to read the statute the other way; in fact the defendants, the intervenor, and our dissenting brother, [citation omitted] all did so when the statute was before us initially." *Baird II* at 855. "This is not an unimportant matter. . . . Clearly, the freer the parent may feel to refuse consent, the more likely it will be that the minor will have to go to court." *Baird II* at 856.

Further, even when parents conscientiously seek to act in what they perceive to be their daughter's "best interests", it is likely that in the abortion context some parents will refuse consent for what are constitutionally impermissible reasons. For example, some parents will conscientiously believe that it is never in the best interests of their daughter to have a non-emergency abortion. There are parents who "would under no circumstances consent to the abortion". *Baird I* at 853. *See also* appellants' admissions at 1 App. 403-404. Obviously, parental judgments are, and always have been, influenced by the parents' moral and religious views,[55] and this is both benign and proper as to most issues. However, imposition of religious mores to override a minor's constitutional rights is impermissible. *State* v. *Koome,* 84 Wash. 2d 901, 908, 530

their daughter's best interest. "[T]his can be a bone of contention between the wife and husband." 2 App. 22.

[55] The evidence suggests that the most common reason for withholding consent "is of a religious nature". 2 App. 38.

P. 2d 260, 265 (1975); *Wisconsin* v. *Yoder,* 406 U.S. 205, 233-234 (1972). In the context of the minor's right to make the abortion decision, the state is forbidden to enforce a parental veto over a minor's informed decision to have an abortion "regardless of the reason for withholding the consent." *Danforth* at 74.

Not only does the text of the statute fail to require that parents limit their consideration exclusively to the minor's best interests, but it is so broad that it suggests that parents need not limit their consideration to those best interests. This increases the likelihood of parents refusing consent to a minor for reasons other than her best interests, and, consequently, increases the likelihood of courtroom confrontations between parents and minor. Increasing this likelihood of courtroom confrontation is, as has been demonstrated, an undue burden.

II. The Burdens Imposed by the Statute Are Not Justified by Any Significant State Interest.

Restrictions on a minor's constitutional right to decide must be justified by a significant state interest and must be narrowly drawn to further only that interest. In *Carey* v. *Population Services Int'l.,* 431 U.S. 678 (1977), this Court confirmed that "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults", and said that "[s]tate restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest . . . that is not present in the case of an adult.' " *Id.* at 693, quoting *Danforth* at 75. If such restrictions do serve a significant interest, they must nonetheless be "narrowly drawn". *Roe* v. *Wade,* 410 U.S. at 155. Any interest proffered as supporting the statute must be judged by each of these tests: the interest must be significant; and the restrictions which purport to further it must be drawn narrowly.

The state's interest in a minor's abortion decision must, under the principles of *Roe* v. *Wade* and *Danforth,* be restricted to its traditional concern with a minor's capacity to consent to a medical procedure. Nothing in *Danforth, Bellotti, Carey* or *Maher* suggests any retraction of this rule. Thus, in *Danforth,* this Court left open only the question whether "every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy", *Danforth* at 75, and in *Bellotti I,* this Court explicitly identified its concern with that issue. *Id.* at 147.

In their Brief, appellants suggest three interests which they claim would meet the "significant state interest" test if that test is applied.[56] However, none of these interests justifies the burdens of the statute here.

A. *The Statute Is Not Limited to and Does Not Further the Alleged State Interest in Preventing "Improvident Decision Making".*

Appellants describe the first "significant state interest" supposedly served by the statute as a "desire to provide protection against improvident decision making related to a minor's immaturity or the other peculiar problems of adolescence and childhood". Brief for the Appellants, 37. Appellants do not elaborate on the phrase, but as parental rights apart from the minor's best interests cannot be recognized (*Attorney General* at 292), the phrase apparently means no more than that the state has an interest in insuring that a minor is capable of giving informed consent.

The traditional view that minors have "a lesser capability for making important decisions", *Carey* at 693 n.16,

[56] Initially, appellants (Brief, 16, 27-33) make the curious claim that the statute "does not affect a minor's fundamental right to make the abortion decision" at all. But that claim is rebutted by the facts found by the district court, which neither appellants nor intervenor-appellants suggest are clearly erroneous.

would arguably justify some special safeguards to ensure that the minor in fact has the capacity to understand the applicable risks and consequences in order to "give effective consent for termination of her pregnancy." *Danforth* at 75. The Massachusetts statute, however, not only fails to support the state interest in ensuring the capacity to give informed consent, but even works against it. And the statute plainly is not "narrowly drawn" to further only that interest, but rather sweeps far beyond it.

The statute makes no provision for determinations of capacity or parental consultation or judicial superintendence in the case of pregnant minors who elect to continue their pregnancies and have a child,[57] but, with respect to those minors who do wish to terminate their pregnancies, the statute then imposes restrictions without regard to whether the decision constitutes an informed consent. A determination of capacity to give informed consent is hardly furthered by a requirement of notice to both parents even when such notice is *against* the best interests of a minor. Nor does the provision for judicial override of a mature minor's informed consent have anything whatever to do with ensuring the capacity to give informed consent: the statute, as interpreted by the state court, does not direct the judge's inquiry to ascertaining the minor's capacity but rather to his independent view of her "best interests".

In Massachusetts, the state's common law and statutory mature minor rules already supply an entirely adequate mechanism to determine capacity to consent. Where

[57] Indeed, Massachusetts disavowed any interest in preventing an improvident decision to bear a child by enacting legislation that permits any pregnant minor who continues her pregnancy, regardless of maturity, to consent to medical treatment relating to bearing a child (*e.g.,* a Caesarian section) or to any other kind of medical treatment. Mass. G.L. c. 112, § 12F.

either of these rules applies, a minor is capable of giving consent to a medical procedure without notice to parents and without judicial intervention. *Attorney General* at 296, 302. Additionally, under Mass. G.L. c. 112, § 12F, an emancipated minor and an unemancipated pregnant minor are permitted to consent to all medical procedures except abortion and sterilization. Both by statute and by decisional law, Massachusetts has elected to protect its traditional interest in ensuring that a minor has capacity to consent to medical procedures *without* reliance on a chronological test [58] and *without* judicial involvement. The issue of informed consent is left to the judgment of medical personnel who may but are not required to seek judicial involvement in an appropriate case. *Attorney General* at 296.[59] Thus, the state has already established how consent should be assessed in order to determine that it is competent and fully informed. The state court recognized the accepted procedure in stating:

[58] Dissenting in *Danforth*, Mr. Justice Stevens noted that the Missouri parental consent statute was

> consistent with the predicate which underlies all state legislation seeking to protect minors from the consequences of decisions they are not yet prepared to make. In all such situations, chronological age has been the basis for imposition of a restraint on the minor's freedom of choice even though it is perfectly obvious that such a yardstick is imprecise and perhaps even unjust in a particular case. *Danforth* at 105-106.

This reasoning is inapplicable to Massachusetts, where the state has rejected chronological age as the basis of any general restraint on a minor's capacity to consent to medical procedures.

[59] Because the abortion decision is medical in nature, *Roe* v. *Wade*, 410 U.S. at 166, it is appropriate for a physician or other trained medical personnel to participate in determining the existence of informed consent. Although "peculiar problems of adolescence and childhood", Brief for the Appellants, 37, must be taken into account insofar as they are relevant to this determination, there was uncontradicted testimony that minors are better able to appreciate the consequences of having an abortion than of having a child. 2 App. 58.

> The grounds for consenting to an abortion under § 12[S] . . . are not different from the standards to be applied in determining whether some other medical procedure should be performed on a minor pursuant to § 12F. *In each instance,* a physician must exercise his or her *medical judgment* and the minor must consent to the procedure as being in his or her best interest. *Attorney General* at 300 (emphasis added).

The statute, however, does nothing to further the existing procedure for determining capacity to give informed consent. Instead, it substitutes irrational presumptions: any minor who chooses to have a child is conclusively presumed to have that capacity; and any minor who chooses to have an abortion is conclusively presumed to lack that capacity.

Moreover, the statute not only fails to assist in ensuring a capacity to give informed consent, but it even works against the basic principles of informed consent.[60] As the district court found, the statute as construed will deter many minors from exercising their constitutional right to

[60] This Court's approval, in *Danforth,* of a statute requiring written consent of the pregnant woman herself is distinguishable from this case on all four grounds on which the *Danforth* trial court had relied in upholding the statute:

First, the purpose of the written consent requirement there was to ensure "that the pregnant woman retains control over the discretions [sic] of her consulting physician";

Second, the requirement did not "single out the abortion procedure, but merely include[d] it within the category of medical operations for which consent is required";

Third, the consent requirement was "not burdensome or chilling"; and

Fourth, the requirement "in no way interposes the state or third parties in the decision-making process." *Danforth* at 66, quoting from the decision below in that case, 392 F. Supp. 1362, 1368, 1369 (E.D. Mo. 1975).

choose in favor of the abortion decision. For some, this will result in an unwanted pregnancy; for others it will result in resort to out-of-state or illegal abortions. In any event, the minor's choice will be influenced by extraneous burdens and harms imposed by the statute.

B. *The Statute Is Not Limited to and Is Not Justified by the Alleged State Interest in "Sanctioning" Parental Consultation.*

The second supposedly significant state interest identified by appellants (Brief, 37) is "a determination to sanction" parental consultation. Appellants offer no further explanation of what this "sanction" means, but presumably they mean that the state legislature wants to encourage pregnant minors who want abortions to consult with their parents.[61] Appellants may, accordingly, be relying on the suggestion of Mr. Justice Powell, writing for the majority in *Maher,* that a statute might be constitutional if it were to authorize the "less burdensome requirement of parental consultation" rather than a parental veto. 432 U.S. at 473.

But the Massachusetts statute goes well beyond a requirement of parental consultation. Consultation is simply the statutorily required first step, and it is required, not merely "sanctioned," in every case — however harmful in fact the forced consultation may be to the minor or to the family relationship.[62] Where consulta-

[61] This "consultation" may, of course, consist of nothing more than a courtroom confrontation.

[62] As the concurring opinion of Justices Stewart and Powell in *Danforth* suggests, a parental consultation statute would be overbroad and unduly burdensome if it required parental consultation in *every* instance where a minor seeks an abortion. This concurring opinion envisages the possibility of approving a statute which requires parental consent or consultation only "in most

tion fails to produce unanimous agreement, the statute gives the minor no alternative to seeking judicial consent, and it permits a judge to veto her choice, even if it remains her choice after parental consultation, even if it is an informed and reasonable choice, and, indeed, even if it is a choice in which one consulted parent concurs. In short, the suggestion made by Mr. Justice Powell in *Maher* does nothing to save the statute here.

Moreover, while it can hardly be disputed that "the views of parents . . . *may* have a beneficial influence (a) on the circumstances under which an abortion is to be performed . . . and (b) on the amount, source, and quality of post-operative assistance and counselling . . . which the minor will receive", *Attorney General* at 294 (emphasis added), the statute cannot have any such effect where the parents "hold strong anti-abortion convictions" (*Baird III* at 1001), and would "under no circumstances consent" (*Baird I* at 853). Nor is a lawsuit between a minor and her parents likely to produce this "beneficial influence." The statute is both overbroad in imposing burdens unrelated to encouraging parental consultation on a minor who would choose abortion and, at the same time, underinclusive in disregarding consultation with respect to the pregnancy continuation/termination decision whenever the minor's initial choice is continuation of her pregnancy. The decision confronting

cases," but which provides for judicial determination either "that the minor is mature enough to give an informed consent without parental concurrence" or "that abortion in any event is in the minor's best interests." *Danforth* at 90-91.

Dispensing with parental notice in such cases is what the district court described as "parents' bypass". The recognition of such cases reflects the fact that parental involvement does not necessarily enhance the decision-making process, particularly where consultation is forced upon the participants. *See Poe* v. *Gerstein,* 517 F. 2d 787, 792-793 (5th Cir. 1975), *aff'd sub nom. Gerstein* v. *Coe,* 428 U.S. 901 (1976).

a pregnant minor is not whether to have an abortion, but whether to have an abortion or have a child. The decision has "irrevocable consequences whichever way it is made." *Danforth* at 95 (White, J., dissenting). The decision should be made "with full understanding of the consequences of *either alternative*. . . . Whatever choice a pregnant young woman makes — to marry, to abort, to bear her child out of wedlock — the consequences of her decision may have a profound impact on her entire future life." *Id.* at 103 (Stevens, J., dissenting; emphasis added). The statute, however, does not in any way question or burden any minor's decision to continue a pregnancy. Her decision to bear a child, however immature or irrational or ill-informed or contrary to her best interests or contrary to her parents' wishes, is entirely unaffected by the statute. The statute is not designed to enhance the minor's chances to make the best decision "whichever way it is made." *Danforth* at 95 (White, J., dissenting). The statute is designed to restrict only a decision to abort.

C. *The Statute Is Not Limited to and Is Not Justified by the Alleged State Interest in Remedying the Purported Inadequacy of Counselling by Some Clinics.*

Appellants' third and final suggested state interest (Brief, 38) is that of remedying or compensating for "the willingness of some abortion clinics and physicians . . . to perform abortion surgery" without sufficient counselling. This interest may well be a significant one, but it does not justify the statute here, because it cannot seriously be argued that the statute is "narrowly drawn to express only the legitimate state interests at stake." *Roe* v. *Wade*, 410 U.S. at 156. If clinic and physician counselling is inadequate, that deficiency obviously might be met, for example, by requiring counselling by qualified medical personnel,

perhaps followed, if the end of the first trimester is not too near, by a very brief waiting period before the abortion is performed. *Cf. Danforth* at 66 (approving a patient consent requirement which " 'in no way interposes the state or third parties in the decision making process' ", quoting decision below, 392 F. Supp. at 1375). But it is obvious that requiring parental notification which is objectively against a minor's best interests cannot possibly protect against occasions of inadequate professional counselling. Nor does the statute's provision that a judge can overrule a mature minor's informed decision to choose the abortion alternative have any relation to the suggested state interest in preventing inadequate counselling. *See Zablocki v. Redhail*, 434 U.S. at 388-389.

In short, the Massachusetts statute imposes significant burdens upon a minor's privacy rights, and it is not justified by any of the state interests which appellants assert. The provisions for mandatory parental notice against a minor's best interests and for judicial override of a mature minor's informed choice bear no rational relationship to those asserted interests.[63]

III. The District Court Correctly Concluded that the Massachusetts Statute Impermissibly Discriminates Against a Mature Minor's Right to Decide Whether to Terminate Her Pregnancy in Violation of the Equal Protection Clause.

With respect to mature minors, the Massachusetts statute also denies equal protection of the laws, for substantially the same reasons that render it defective under due process analysis. The district court held that the stat-

[63] For an example of a state statute narrowly drawn to address the state's interest in encouraging parental consultation without mandating such consultation where harmful to the minor and without mandating judicial involvement, see the Maryland enactment, reproduced in pertinent part at Appendix A hereto.

ute's treatment of mature minors is "both an undue burden in the due process sense, and a discriminatory denial of equal protection." *Baird III* at 1004.

Under the equal protection clause, "[t]he basic framework of analysis . . . is well settled: 'We must decide, first, whether [state legislation] operates to the disadvantage of some suspect class or *impinges upon a fundamental right* explicitly or implicitly protected by the Constitution.'" *Maher,* 432 U.S. at 470, quoting *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 17 (1973). Here, the statute unquestionably restricts the minor's constitutional right to decide whether to terminate her pregnancy. By reason of the statute, Massachusetts "has imposed . . . restriction[s] on access to abortions that [were] not already there." *Maher* at 474 (distinguishing, in equal protection terms, between encouragement of the pregnancy continuation choice by supplying government benefits, and discouragement of the pregnancy termination choice by imposing restrictions or burdens).

These restrictions must meet equal protection standards. "[T]he same test must be applied to state regulations that burden an individual's right to decide . . . as is applied to state statutes that prohibit the decision entirely." *Carey,* 431 U.S. at 688. Because the statute impinges upon a fundamental constitutional right, it must be justified by a "'significant state interest'", *Carey* at 693, quoting *Danforth,* 428 U.S. at 75, and must be implemented by "legislative enactments . . . narrowly drawn to express only the legitimate state interests at stake." *Roe* v. *Wade,* 410 U.S. at 155.

Under this strict standard of review, the interests asserted by the state in support of the statute (other than insuring a minor's capacity to consent) are not significant, and the classifications imposed by the statute are not narrowly drawn to conform to the state interests they purport to serve. Indeed, several of the discriminatory re-

strictions which result from the statutory classification scheme cannot be justified by any rational analysis.

A. *The Statute Impermissibly Discriminates Among Classes Similarly Situated.*

1. *The statute impermissibly discriminates between mature minors and adults.*

The district court properly found "no reasonable basis for Massachusetts distinguishing between a minor and an adult, given a finding of maturity and informed consent." *Baird III* at 1004. Yet the statute distinguishes between mature minors and adults in two respects: *first,* it mandates notice to both parents for mature minors, but not for adults; *second,* and, more intrusively, it permits a judicial override of a mature minor's informed consent to an abortion, but not of an adult's.

The essence of this Court's decisions in *Roe* and *Danforth* is that the decision of an adult woman whether to terminate her pregnancy is one to be made solely by the woman in consultation with her physician. Whether an adult woman's decision to terminate her pregnancy is prudent or wise or in "her best interests" is emphatically not a judgment to be made by her spouse, her parents, or a judge, even though some adult women undoubtedly will choose imprudently or unwisely or even, from a third party's view, against their best interests. "[T]he State cannot delegate authority to any particular person, even the spouse, to prevent abortion during [the first trimester]." *Danforth* at 69.

The district court correctly concluded that a minor stands constitutionally in the same position as an adult, but for "the special consequences of her minority — immaturity and the lack of informed understanding." *Baird III* at 1003; *see Danforth* at 75 (state restrictions on mi-

nors' rights to obtain an abortion are valid only if they serve "any significant state interest . . . *that is not present in the case of an adult.*") (emphasis added); *accord, Carey* at 693. In the absence of these disabilities associated with youth — when the minor is found to be mature and fully informed — there is simply no justification for the state's treating the minor any differently from a young adult. In other words, the state's special interest in protecting the minor from the consequences of "immaturity and lack of informed understanding" is exhausted once it is found that the minor is in need of no greater protection than the adult.[64] For the state to persist, after finding a minor to be mature and informed, in distinguishing between that minor and an adult is without even a rational basis and is impermissible.

2. *The statute impermissibly discriminates between mature minors seeking an abortion and those seeking medical care under the Massachusetts common law mature minor rule.*

The statute imposes restrictions upon mature minors seeking abortions which are not present under the common law when a mature minor seeks other medical care. The state court described the scope of the Massachusetts "mature minor rule" in the following language:

> [A]part from statutory limitations which are constitutional, where the best interests of a minor will be

[64] The distinction between the treatment of minors and adults cannot in Massachusetts be defended by reference to the economy and efficacy of adopting a "bright line" chronological test of maturity, because the Massachusetts statutory scheme already contemplates a procedure for *ad hoc* determinations of maturity. The impermissible burdens of mandatory parental notice and possible judicial override are imposed by the statute even where a judge has already made the *ad hoc* judgment that the minor in question is mature and capable of giving an informed consent.

> served by not notifying his or her parents of intended medical treatment and where the minor is capable of giving informed consent to that treatment, the mature minor rule applies in this Commonwealth. In such a case . . . judicial involvement is not required . . . . *Attorney General* at 296.[65]

Thus, absent special statutory restrictions, no mature minor would be compelled to seek court permission to obtain an abortion, and no mature minor would be compelled to notify her parents of her decision when her physician agreed that such notification would be against her best interests. This mature minor rule is completely unrelated to chronological age.

Appellants' argument (Brief, 46) that the limited Massachusetts common law mature minor rule generally requires the minor to obtain "parental *consent*" rather than merely to *consult* her parents is incorrect. (Emphasis added.) Although a literal reading of the state court's opinion might appear to support that statement of the rule, the court must have meant that parental *consultation* is required except when it would be against the minor's best interest. Its discussion of the topic is headed "Parental *Consultation* as a Requirement" (*Attorney Gen-*

[65] It is insignificant that the Massachusetts mature minor rule also requires the physician to be satisfied that the minor's best interests will be served by not notifying the parents. There is no good reason not to notify parents unless the minor's best interests dictated otherwise: a prudent physician would surely rather have parental consent if obtainable, than rely solely on a mature minor rule as a defense in a battery suit. But the district court was certainly aware of the limitation, as it expressly quoted it:

> [The state court] went on to state that, but for the statute, the mature minor rule would permit an informed consent "where the best interests of a minor would be served by not notifying . . . her parents." 360 N.E. 2d at 296. *Baird III* at 1003.

eral at 293; emphasis added), and is responsive to the district court's inquiry whether, in some instances, a minor may obtain an abortion " 'without parental *consultation*'?" (*id.* at 293 n.6; emphasis added). It repeatedly refers to "parental involvement" or "parental consultation" or "notifying" parents (*id.* at 293-297). If, as appellants argue, the mature minor rule announced by the state court required parental *consent* in most cases, rather than merely *consultation,* the rule would be flatly contrary to *Danforth,* at least as to mature minors. Inasmuch as the state court specifically noted the *Danforth* holding (*Attorney General* at 291), and announced the rule in recognition of the fact that "the case for a mature minor rule has particular force" when the medical procedure is one to which "the minor may be entitled by constitutional right" (*Attorney General* at 296), the state court surely did not intend to state a rule which *Danforth* held to be patently unconstitutional.

The constitutionality of the distinction drawn by the statute between consent to abortion procedures on the one hand, and the common law requirements with respect to consent to other medical procedures on the other hand, depends, in the first instance "upon its degree." *Bellotti I* at 150. The degree of the distinction is now established: parental notice even when contrary to the minor's best interests, judicial proceedings, and a judge's possible overriding of the decision of the mature minor are burdens imposed in all cases where a mature minor's parents have not consented to an abortion; these burdens are absent at common law.[66]

[66] Appellants confuse two quite different concepts when they argue (Brief, 46) that both the common law and § 12S require inquiry into the minor's "best interests." The "best interests" test of the Massachusetts common law mature minor rule is a test applied by a physician to determine whether parental notice is inconsistent with a mature minor's best interests. (For abortions, however, parental notice is required by the statute in every case.)

3. *The statute impermissibly discriminates between mature minors seeking an abortion and those seeking other medical care under the Massachusetts statutory mature minor rule.*

Apart from the Massachusetts common law mature minor rule, the state legislature has also created a statutory mature minor rule. Massachusetts General Laws c. 112, § 12F was characterized by the state court as "a legislative mature minor rule (or perhaps an emancipated minor rule, or both), allowing consent for most medical and dental care." *Attorney General* at 296 n.9. Under the statutory rule, a married or previously married minor may consent to any medical or dental care, including an abortion or sterilization. Five other categories of minors, including pregnant minors,[67] are authorized to consent to any such care other than abortion or sterilization. In all such cases, chronological age is irrelevant.

Under § 12F, therefore, minors who fit any of the categories described may consent to such procedures as Caesarian sections, bone marrow transplants, kidney transplants or donations, amputations, open heart surgery, hysterectomies and mastectomies, or other serious medical procedures described by the district court as "more complicated and dangerous" than abortion. *Baird III* at 1003-1004. Unless married or previously married, however, such minors may not consent to the relatively simple and risk-free procedure of a first trimester abortion. This plainly discriminates against the mature unmarried preg-

The "best interests" test of the statute's judicial override rule is applied by a judge to determine whether to reject a mature minor's informed choice of an abortion as, in his view, against her best interests.

[67] The fourth classification of minors in § 12F who are authorized to consent to medical or dental care is the minor who "(*iv*) . . . is pregnant or believes herself to be pregnant."

nant minor as compared with any married or previously married minor. And it discriminates against the mature unmarried pregnant minor who chooses an abortion procedure as compared with all such minors who choose any other medical procedure.

Appellants suggest (Brief, 47) that the state court's opinion offered a method of construing § 12S and § 12F together in a way that would eliminate the discrimination, although appellants do not discuss the state court's analysis of this issue, and the state court's discussion itself is unclear. *See Attorney General* at 303. It appears, however, that the state court, to avoid an unconstitutional discrimination, would construe § 12F to mean that one of the six listed classes of "emancipated minors" — the married or previously married minor — would, like the other five classes described in the statute, be excluded from giving consent to abortion or sterilization. Thus, notwithstanding the express language of the third paragraph of § 12F which excludes only the other five categories of mature or emancipated minors from the right to consent to abortion or sterilization, married or previously married minors would also be excluded, and the statute's provision that "a minor may give consent to [her] medical . . . care" would be construed, in the pregnancy context, "to apply only to certain medical procedures associated with a determination of pregnancy and counseling concerning abortion." *Attorney General* at 303.

This forced construction of § 12F would, of course, eliminate the irrational distinction based on marital status [68] which is expressed in § 12F itself. However, it

[68] Marital status does not affect a minor's maturity in fact. At common law, marriage merely emancipated the minor from parental control; it did not confer capacity generally, nor remove other disabilities of minority, such as the inability to make an enforceable contract. *Commonwealth* v. *Graham*, 157 Mass. 73, 76 (1892); *Taunton v. Plymouth*, 15 Mass. 202, 203 (1818). Thus, it is irrational, and does not promote wise and prudent decision making, to impose greater burdens on a mature unmarried minor than are imposed on the married immature minor. *State* v. *Koome*, 84 Wash. 2d at 903, 530 P. 2d at 262; *cf. Carey* at 685; *Eisenstadt* v. *Baird*, 405 U.S. at 453. *But see, Baird III* at 1018 (Julian, J., dissenting).

does not address the fact that § 12S *also* provides that a minor married or previously married is not subject to its strictures.

Moreover, even were the statute susceptible of a construction which would eliminate the marital status distinctions, the state court's suggested construction of § 12F would not eliminate the discrimination visited upon minors "emancipated" under § 12F (regardless of marital status) who wish to decide in favor of an abortion as compared to (i) such minors who wish to bear a child or (ii) such minors who wish to submit to another medical procedure. Indeed, the state court acknowledged as much, in stating that if these distinctions were found to be invalid under the equal protection clause, the state court would then, of necessity, construe § 12S's parental and judicial approval provisions as not applicable to the classes of minors enumerated in the statutory mature minor rule. *Attorney General* at 303: "If the distinction between pregnancy-related operations and other operations cannot withstand an equal protection challenge . . . the parental (and judicial) consent provisions of § 12[S] must fail insofar as is necessary to eliminate the constitutional defect . . . ."

B. *The Discriminatory Classifications Imposed by the Statute Are Not Justified by Any Significant State Interest, Nor Are They Narrowly Drawn.*

Recognizing the essential similarity of due process and equal protection analysis in this case, appellants do not

separately describe in equal protection terms the allegedly significant state interests which they proffer as justification for the statute. As has been shown (Argument II, ante), none of these three interests — protection against improvident decision making; "sanctioning" of parental consultation; and compensating for inadequate clinic counselling — justifies the restrictive burdens which are *uniquely* imposed upon the mature unmarried pregnant minor who wishes to decide in favor of the abortion choice.

Further, with respect to the statutorily-imposed requirement of notice to both parents in all cases and provision for "judicial override", the discriminations imposed by the statute do not meet even "the less demanding test of rationality that applies in the absence of . . . the impingement of a fundamental right." *Maher* at 478.[69] Notifying a pregnant minor's parents of her decision in favor of the abortion choice and giving them an opportunity to oppose it in court is hardly a rational means of furthering "the state interest in encouraging normal childbirth" (found in *Maher* at 479 to meet the rationality test), particularly in cases where that notice is objectively and factually *against* the minor's best interests. Similarly, there is at best the thinnest rational relationship between this state interest and the substitution of what even the dissenting judge in the district court described as "the arbi-

[69] *Maher*, of course, held only that classifications for allocation of welfare funds "survive equal protection challenge when a 'reasonable basis' for the classification is shown", that "the state interest in encouraging normal childbirth" provided such a basis, and that this state interest, under rational basis analysis, justifies a state's unwillingness to subsidize the "termination of a potential human life" absent a showing of medical necessity. *Maher* at 478-480. This state interest may not, of course, be furthered by "direct obstacles — such as criminal penalties." *Colautti v. Franklin*, — U.S. —, No. 77-891, slip op. at 7 n.7 (Jan. 9, 1979).

trary will of the [state superior court] judge." *Baird III* at 1015. To be sure, the state's interest in encouraging normal childbirth justifies steps to assure the availability of adequate medical care for pregnant minors, but it cannot justify the imposition of significant burdens on any pregnant woman who, in the first trimester, competently elects to end her pregnancy.

Measuring the statute by the requirement that it be "narrowly drawn to express only the legitimate state interests at stake," *Roe* v. *Wade*, 410 U.S. at 155, the substantial overbreadth of the statute with respect to each of the three supposed state interests which appellants have cited in its support has already been demonstrated (*see* Argument II, ante). Nor is the statute narrowly drawn to meet the minimal state interest in encouraging normal childbirth. This interest would be vindicated in its full legitimate scope by recognition of a mature minor rule (which would permit mature minors to consent to necessary medical care) coupled with an absolute requirement of fully informed consent by the minor herself, before any abortion might be performed. *Cf. Danforth* at 65-67 (patient consent requirement sustained).

Finally, the statute not only is overinclusive in imposing restrictions on mature unmarried pregnant minors who decide in favor of abortion, but also is underinclusive in doing nothing to prevent improvident decision making or to encourage parental consultation by the unmarried pregnant minor who wishes to decide in favor of having a child. The minor who continues her pregnancy is certainly no less in need of counselling and guidance than a similar minor who decides in favor of abortion. Yet the statute does nothing to provide counselling in the former case. This underinclusiveness exposes the hypocrisy of the state's advocacy of these purported interests and un-

derscores the correctness of the district court's holding that the statute works not only an undue burden but also, as to mature minors, "a discriminatory denial of equal protection." *Baird III* at 1004.

IV. The District Court Properly Concluded that the Massachusetts Statute Was Invalid on Its Face and Enjoined Its Enforcement as to All Minors.

A. *Because the Claims of All Minors to Whom the Statute Applies Were before the District Court, the Statute Was Properly Invalidated on Its Face.*

The district court properly employed a facial analysis of the statute's constitutionality because the claims of all persons to whom the statute applies were before the court and were not hypothetical. Where the statute unconstitutionally burdened the rights of those persons, it was properly invalidated on its face.

Appellants argue that a facial analysis of the statute was improper because the claims of immature minors were not before the district court.[70] On the record below, the claims of all minors were in fact before the district court.[71]

[70] The "Questions Presented" by appellants expressly state that one question on appeal is whether the statute "violates the constitutional rights of certain minors . . . *e.g.*, those incapable of giving 'informed consent'." Jurisdictional Statement at 5.

[71] Appellees' intention *not* to waive immature minors' claims was twice expressly confirmed by counsel for appellees. 2 App. 472, 475. Even if appellees had tried to waive the claims of immature minors, the district court quite properly indicated its unwillingness to accept such a waiver. *Baird III* at 1001 n.6. In managing a class action suit, the district court is obliged to take appropriate supervisory action to protect absent class members. Fed. R. Civ. P. 23(d)(3), (5). Any dismissal of the action, in whole or in part, must be approved by the court. Fed. R. Civ. P. 23(e). The court may also permit intervention by a party who will better protect those interests. 3B *Moore's Federal Practice* § 23.73 at 23-495.

The district court certified a plaintiff class which was represented by Dr. Zupnick and Parents Aid Society. *Baird I* at 852. Those representatives were held to have standing "to attack the statute as applied to *all* minors, at least insofar as it requires the consent of both parents." *Id.* (emphasis added). The court later confirmed that immature minors were within the scope of the class represented by Dr. Zupnick. *Baird III* at 1001 n.6.[72] Plaintiffs stipulated that their attack was a facial one, 2 App. 213, and counsel for appellants informed the court that he considered the case to be a facial attack on the statute with respect to every woman to whom the statute applied, including minors "not capable of conception [consent?]". 2 App. 477-78. Because the statute purports to regulate all unmarried minors[73] and because all persons within the scope of the statute were challenging it, a facial analysis was plainly proper.

Even were Dr. Zupnick not a class representative *per se*, he, as a physician facing likely prosecution, has standing to assert all minor patients' claims, just as did the physician in *Danforth*. *Danforth*, 428 U.S. at 62. The standing of a physician to raise his patients' constitutional rights has been repeatedly affirmed in the context of challenges to statutory restrictions on abortion. *E.g.*, *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973). For purposes of

[72] Contrary to appellants' assertion (Brief, 50), the "Motion to Certify Plaintiffs Classes" was limited to mature minors only with respect to the class represented by Mary Moe. (*See* p. 43 of the Appendix in *Bellotti I*.)

[73] Relying on the fact that the statute also requires the minor's own consent, appellees have argued that the statute by its terms only applies to minors capable of giving consent or "mature" minors. 1 App. 426. Inasmuch as the district court found the statute to be applicable to "all minors" (*Baird I* at 852), it is argued herein that the statute is also unconstitutional as to immature minors.

a facial attack, whether immature minor's claims were before the court by virtue of Dr. Zupnick's class representative status or by virtue of his standing to raise such claims is of no consequence. *See Singleton* v. *Wulff*, 428 U.S. 106, 117-118 (1976).

Because the claims of immature minors were properly asserted by the physician plaintiff, this is not a case involving first amendment overbreadth analysis. Here, the third parties are not hypothetical; they are represented by the class representatives; and their rights are indeed at stake in the proceeding.[74] The district court correctly concluded "[n]or do we agree with defendants that this is a case of parties seeking relief for overbreadth improperly affecting others, not before the court." *Baird III* at 999.

Immature minors themselves have significant constitutional claims in this case, including claims concerning the burden of obtaining both parents' consent, or failing that, the burden of undertaking judicial proceedings and notifying both parents thereof; and the burden of a statute whose broad language increases the likelihood of improper parental refusals.

Recognition of the "chilling" or deterrent effect of a statutory scheme is plainly appropriate in considering whether undue burdens have been placed on rights of reproductive privacy. *See Carey*, 431 U.S. at 688; *Bellotti I* at 147. This Court has itself expressly considered the deterrent effect of a statute under a claim that it invades privacy rights. *E.g., Whalen* v. *Roe*, 429 U.S. 589, 602-603 (1977). In *Danforth*, Mr. Justice Stewart also considered

[74] *See* Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423, 423-424, 438-440 (1974); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 847-848 (1970) (both notes distinguishing overbreadth claims from true *jus tertii* claims).

whether, under one section of the challenged statute, "a physician's professional decision to perform an abortion will be 'chilled'." *Id.* at 89; *accord, Colautti* v. *Franklin*, — U.S. —, No. 77-891, slip op. at 14 (Jan. 9, 1979) (Pennsylvania abortion statute has "chilling effect on the exercise of constitutional rights."); *see also id.* at 17.[75]

In employing a facial analysis of the statute and rejecting appellants' proposed "as applied" analysis, the district court followed the established precedent of this Court. At no time has this Court examined statutes in abortion cases under an "as applied" analysis. *See, e.g., Colautti* v. *Franklin, supra; Maher* v. *Roe*, 432 U.S. 464 (1977); *Danforth, supra; Roe* v. *Wade*, 410 U.S. 113 (1973); *Doe* v. *Bolton*, 410 U.S. 179 (1973).

Facial invalidation was also appropriate in view of the extent of the statute's infirmities. Not only is the statute infirm as to immature minors, but it must fall as to all mature minors, whose abortions constitute the vast majority of cases to which the statute is likely to apply.[76] In

[75] The district court's use of the term "chilling effect" hardly demonstrates that the court applied first amendment overbreadth analysis in this case. On this point, appellants confuse differing doctrines. "Chilling effect" is a doctrine of substantive law concerned with burdens which discourage the exercise of fundamental rights, as well as a doctrine of first amendment overbreadth. *See M.S.* v. *Wermers*, 557 F. 2d at 176 ("chilling effect" on effort to vindicate privacy right).

Indeed, the use of the term "overbreadth" in abortion rights cases to refer to a legislature's failure to enact narrowly drawn statutes is not uncommon. *See Danforth* at 59, 83-84 (affirming holding below that statutory provision was "unconstitutionally overbroad").

[76] Appellants' contention to the contrary is based on a chart (Brief, 67) which the district court accurately characterized as "fanciful". *Baird III* at 1001. Appellants' chart fails to be an accurate representation of anything. As set forth in the Statement of Facts, ante, 91% of all abortions are performed in the first trimester, and about ¾ of all abortions on minors are on

addition, as argued post, there are no savings constructions or excisions available and appropriate.

B. *It Would Have Been Improper for the District Court to Have Rewritten the Statute as Appellants Urge.*

Appellants suggest that this Court "should accept the invitation" of the Massachusetts legislature and the state court to construe the statute in whatever way necessary to permit it to be enforced in some form. Brief for the Appellants, 62. *See also id.*, 58, 60. Their suggestion — which they candidly admit is "unusual" (Brief, 58) — has no virtues and many vices.

Even if the statute might have been susceptible to a savings construction at one time, that option has been foreclosed by the state court's authoritative construction. Certainly this is a harder case for a savings construction than *Roe* and *Danforth,* where, even in the absence of state court decisions construing the state legislation at issue, this Court declined to attempt any savings construction. In this case, by contrast, the state court has answered certified questions clearly and unambiguously. *Attorney General* at 303 (summarizing state court's conclusions).

16-and 17-year-olds. Further, as to second trimester abortions, certain requirements of the statute such as parental notice when against the minor's best interests and judicial override of a mature minor's informed decision are not even reasonably related to maternal health. Finally, as to third trimester abortions, allowed only to preserve the life or health of the pregnant woman, Mass. G.L. c. 112, § 12M, the best interests of the minor would seem to require, almost by definition, that in such a life- or health-threatening case the abortion be performed without delay and burdens imposed by § 12S. *Cf.* Mass. G.L. c. 112, § 12Q (permitting a physician to dispense with § 12S consent requirements only in the case of "an emergency requiring immediate action").

1. *The district court lacked power to displace the authoritative construction of the statute by the state court.*

As this Court has repeatedly held, a construction of a state statute by the state's highest court is binding on a federal court subsequently reviewing the statute's constitutionality. *Mullaney* v. *Wilbur,* 421 U.S. 684, 691 (1975); *NAACP* v. *Button,* 371 U.S. 415, 432 (1963); *Winters* v. *New York,* 333 U.S. 507, 514 (1948); *Hebert* v. *Louisiana,* 272 U.S. 312, 316-17 (1926); *Murdock* v. *City of Memphis,* 20 Wall. 590 (1875). "In dealing with state laws, the [federal] Court cannot simply substitute a saving reinterpretation of a statute for that authoritatively given the statute by that state's highest court." Tribe, *American Constitutional Law* 717 (1978) (and authorities there cited).

This principle reflects limits on federal judicial power which cannot, as appellants suggest, be waived.

> Even assuming that a more explicit limiting interpretation of the ordinance could remedy the flaws we have pointed out — a matter on which we intimate no view — we are without power to remedy the defects by giving the ordinance constitutionally precise content. *Hynes* v. *Mayor of Oradell,* 425 U.S. 610, 622 (1976).

Accord, Gooding v. *Wilson,* 405 U.S. 518, 520 (1972). This Court attributed its similar refusal to rescue a state statute, judged unconstitutional in *Freedman* v. *Maryland,* 380 U.S. 51 (1965), to a lack of "jurisdiction to authoritatively construe state legislation." *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363, 369 (1971).

In addition, for this Court to displace the state court's interpretation would violate the doctrine of abstention. The major premise of abstention is that the "last word" on the state statute's content "belongs neither to us nor to the district court but to the Supreme Court" of the

state. *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 499-500 (1941).

In light of the history of this case, the state court's interpretation of legislative intent has particular weight. The state court's construction was in spite of appellants' vigorous urgings to the contrary. Appellants had urged upon the state court the very "savings" constructions which they now offer to this Court — construing the statute to be inapplicable to mature minors in the first trimester, to contain no judicial power to override a mature minor's informed decision, and to allow a best interests exception to the parental consent/consultation requirement. *Compare* Brief for the Appellants, 60 *with Attorney General* at 294-296. Appellants' urgings were reinforced by this Court's prior opinion, which quite explicitly described the "picture" of the statute that had persuaded the justices to abstain with the suggestion that, if so construed, the constitutional problems raised by the statute would be materially changed. *Bellotti I* at 145, 147. Nonetheless, the state court adopted the negative of that "picture", compelled by its determination of the legislature's intent and despite its claim to be applying the principle of construing the statute to avoid constitutional problems. *Attorney General* at 291. The state court has made a binding determination that appellants' proposed constructions are simply not consistent with the statutory intent. *Attorney General* at 294-295.[77]

In view of the state court's unambiguous constructions of the statute, appellants' suggestion that this Court ignore these constructions and construe the statute differently amounts in this case to a suggestion that the Court determine and advise as to the constitutional outer limits

[77] For example, "[t]he legislature has left no room to apply a mature minor rule where an unmarried minor seeks an abortion without parental consultation." *Attorney General* at 294.

of parental consultation or consent that a state legislature may be permitted to impose.[78] Because this Court does not give advisory opinions or rule on hypothetical statutes or cases, appellants' unusual suggestion must be rejected. *See Flast* v. *Cohen*, 392 U.S. 83, 96 (1968).

2. *The district court properly invalidated the entire statute under well-established principles of statutory construction.*

The district court correctly declined to essay any savings construction for the statute. Violation of the statute is punishable as a *criminal* offense. Mass. G.L. 112, §§ 12Q, 12T. Accordingly, such a statute must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden". *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). It also must not "encourage arbitrary and erratic arrests and convictions." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972). Savings constructions may not be so strained as to render a statute's meaning unacceptably indefinite where criminal penalties are possible. Here, the judicial revision which would be required would be so extensive that "the statute no longer [gives] an intelligible warning of the conduct it [prohibits]." *United States* v. *Raines*, 362 U.S. 17, 22-23 (1960),

[78] Appellants apparently base their suggestion on the state court's statement that "§ 12[S] must be construed to require as much parental consultation as is permissible constitutionally." *Attorney General* at 294. Because one of the state court's answers to certified questions was the flat statement "[p]arental consultation is required in every instance where an unmarried minor seeks an abortion" (*id.* at 303), the district court correctly observed: "[a]lthough the statute is not ours, the Massachusetts court has, in effect, given us the coloring-book. . . . [W]e must doubt our authority to fix terms of a state statute contrary to the prima facie interpretation given it by the state court." *Baird III* at 1006.

citing *United States* v. *Reese*, 92 U.S. 214, 219-220 (1876).[79]

Similarly, savings constructions may not be used where the statute's resulting indefiniteness would impinge upon fundamental rights. "[A]n attempt to 'construe' the statute and to probe its recesses for some core of constitutionality" is unacceptable if that construction "would inject an element of vagueness into the statute's scope and application" and "the plain words would thus become uncertain in meaning. . . ." *Aptheker* v. *Secretary of State*, 378 U.S. 500, 516 (1964) (right to travel). "This appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *Colautti* v. *Franklin, supra*, slip op. at 11.

In such circumstances, this Court has repeatedly declined to fashion substitute legislation. In *United States* v. *Reese*, 92 U.S. 214 (1876), this Court struck down a federal criminal statute rather than limit its general provisions because "[t]o limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." *Id.* at 222. The concerns expressed in *Reese* more recently prevented the judicial rescue of a federal statute in *Blount* v. *Rizzi*, 400 U.S. 410, 419 (1971). As explained in a subsequent decision, "salvation of that statute [in *Blount*], however, would have required its complete rewriting in a manner inconsistent with the expressed intentions of some of its authors." *United States* v. *Thirty-Seven Photographs*, 402 U.S. at 369. *See Interstate Circuit*

[79] Physicians' fears of being prosecuted under the statute are far from groundless in Massachusetts. The district court found that there would be extensive pressure on state law enforcement officials to prosecute under the statute and that it was "highly improbable that they would not immediately respond to such pressures." *Baird I* at 852. *See, e.g., Commonwealth* v. *Edelin*, Mass. Adv. Sh. (1976) 2795, 359 N.E. 2d 4 (dismissing conviction of physician for manslaughter in failing to preserve fetal life).

Inc. v. City of Dallas, 390 U.S. 676, 690 (1968) ("It is not our province to draft legislation.").[80]

Appellants' suggestion that the statute's plain meaning based on the statutory scheme and legislative intent, as found by the state court, may be superceded by some other meaning dictated by constitutional necessity, is misguided. In purporting to apply the maxim that savings constructions are preferred, appellants bypass the threshold inquiry mandated by that maxim — "whether a construction of the statute is *fairly possible* by which the [constitutional] question may be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932) (emphasis added). As a result, appellants would reduce the statutory scheme and legislative intent to a convenient fiction that can be shaped to fit any constitutional requirement.[81] As Mr. Justice Harlan once stated in a re-

[80] The suggestion made by appellants (Brief, 60) of construing the statute to be inapplicable to mature minors in the first trimester is particularly unsatisfactory because the statute would impose criminal liability on a physician who errs in his determination of maturity. Mass. G.L. c. 112, § 12T. Neither § 12T which makes violations of § 12Q criminal, nor § 12Q which prohibits physicians from performing abortions on minors without § 12S consents, nor § 12S itself contains any "good faith" defense. (*Compare* § 12F, which provides for such a defense in other circumstances.) Experts disagree here as to when maturity occurs (*Baird I* at 54), as experts disagreed in *Colautti* (*supra* at 16) as to when fetal viability occurs. Here, as there, "[t]he perils of strict criminal liability are particularly acute because of the uncertainty of the viability [here maturity] determination itself." *Colautti* v. *Franklin, supra* at 16. Thus, even if the statute were construed as appellants suggest, physicians would undoubtedly direct minors to obtain both parents' consent or judicial approval in every case, rather than risk prosecution for a mistaken assessment of maturity. *See People* v. *Belous*, 71 Cal. 2d 954, 963, 973, 458 P. 2d 194, 197-198, 206 (1969).

[81] The district court aptly described this unusual approach as follows: "The Massachusetts court . . . suggests reading into the statute affirmative provisions made out of nothing but a generally announced purpose to pass constitutional muster. In so doing, the court seems to have found the ultimate remedy for all constitutional infirmities. If a statute which, in terms, requires parental

lated context, a statute "is not an empty vessel into which this Court is free to pour a vintage . . . ." *United States* v. *Sisson,* 399 U.S. 267, 297 (1970), cited approvingly in *National Broiler Marketing Ass'n.* v. *United States,* 436 U.S. 816, 827 (1978).

This Court has scrupulously avoided both constructions which cannot be fairly borne by the statutory language and constructions which are not supported by the statutory intent as expressed in the text of the statute.[82] *E.g., American Communication Ass'n* v. *Douds,* 339 U.S. 382, 415, 421-422 (1950) (Frankfurter, J., concurring in part, dissenting in part) ("I deem it my duty to go to the furthest limits in so construing legislation as to avoid a finding that Congress has exceeded the limits of its powers. . . . But what Congress has written does not permit such a gloss nor deletion of what it has written."). Similarly, in *United States* v. *UAW,* 352 U.S. 567, 958 (1957), this Court was unable to apply

> "the cardinal rule of construction, that where the language of an act will bear two interpretations, equally obvious, that one which is clearly in accordance with the provisions of the constitution is to be preferred." *Knights Templars' & M. Life Indemnity Co.* v. *Jarman,* 187 U.S. 197, 205. The case before us does not call for its application. Here only one interpretation may be fairly derived from the relevant materials. The rule of construction to be invoked when constitutional problems lurk in an ambiguous statute does not permit disregard of what Congress commands.

See generally Note, *Supreme Court Interpretation of Statutes to Avoid Constitutional Decisions,* 53 Colum. L. Rev. 633, 646-649 (1953).

Finally, the district court's invalidation of the statute is entirely consistent with the approach this Court has applied to other facial attacks on state statutes that restrict abortion. *E.g., Colautti* v. *Franklin, supra; Danforth, supra*; *Roe* v. *Wade, supra.* In each case, the statute or pertinent section was struck down. As this Court stated in *Roe* v. *Wade,* the abortion statutes in controversy "as a unit, must fall". 410 U.S. at 166. In neither *Roe, Danforth* nor *Colautti* did this Court suggest reading into the state legislation at issue a possible savings construction.

V. The District Court Did Not Commit Reversible Error in Issuing Certain Procedural Orders Denying Discretionary Discovery and Allocating Costs.

A. *The District Court Did Not Err in Denying Appellants' Motion for Leave to Conduct a Survey of Plaintiffs' Class.*

Appellants' argument that the district court committed reversible error in denying their motion, as discovery was closing, to conduct a survey of the plaintiff class of health care providers is insubstantial. The issues raised by the motion were completely within the discretion of the trial court, and there was no abuse of that discretion.

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consultation without exception, can be 'construed to require as much parental consultation as is permissible constitutionally', here, at once, is an instant cure, both for overbreadth, and for lack of standards. Regardless of whether a statute says too much, or too little, so long as the legislature intended it to be constitutional, when it comes before a court it will be appropriately rewritten. With due respect, we cannot believe this to be possible." *Baird III* at 1005-1006.

[82] The relevant determinants of statutory intent are the statute's provisions, not its title. Neither the title nor the severability clause constitutes statutory authority for the federal courts to disregard the more specific provisions that follow or grants carte blanche to the federal courts to supply all the missing details.

Appellants must bear a very heavy burden to show that a pretrial discovery order justifies reversal of a post-trial final judgment on the merits.

> A district court has very wide discretion in handling pretrial discovery and we are most unlikely to fault its judgment unless, in the totality of the circumstances, its rulings are seen to be a gross abuse of discretion resulting in fundamental unfairness in the trial of the case.

Voegeli v. *Lewis,* 568 F. 2d 89, 96 (8th Cir. 1977); *accord, Data Disc, Inc.* v. *Systems Technology Associates, Inc.,* 557 F. 2d 1280, 1285 n.1 (9th Cir. 1977) (must show "substantial" prejudice).

The district court gave no reasons for denial of the motion, nor was it required to, but the first and most obvious reason is lack of timeliness. Appellants' motion, if allowed, would have delayed proceedings in a case where, as this Court observed, "[t]he importance of speed in resolution of the instant litigation is manifest." *Bellotti I* at 151. The motion was not filed until August 1, 1977. 1 App. 44. Discovery for the trial in *Baird III* had commenced on Feb. 22, 1977 (1 App. 29), and was extensive. 1 App. 29-53. At hearings on April 5 and 13, 1977, the court directed the parties to meet concerning a discovery and deposition schedule. On April 12, 1977, appellants filed an extensive "Initial Statement of Disputed Material Facts", which suggested that consent practices were an issue in their view, but appellants then did nothing about pursuing discovery on that topic for several months. 1 App. 125-140. On July 13, 1977, the district court ordered that a pretrial conference be held on August 22, 1977 and that "all pretrial discovery will be completed by Friday, August 19, 1977." 1 App. 41-42. On July 20,

1977, the district court gave appellants the unusual privilege of being permitted to take depositions of plaintiffs' experts. 1 App. 43. Only after all this, did appellants file their motion for a survey. It was not an abuse of discretion for the district court to reject this last minute discovery request. *Aviation Specialties, Inc.* v. *United Technologies Corp.,* 568 F. 2d 1186, 1189 (5th Cir. 1978); *Allen* v. *First National Bank of Atlanta,* 169 F. 2d 221, 224 (5th Cir. 1948); *Cinerama, Inc.* v. *Sweet Music, S.A.,* 355 F. Supp. 1113, 1120-1121 (S.D. N.Y. 1972), *aff'd,* 493 F. 2d 1397 (2d Cir. 1974).

The district court's denial of the motion was proper for other reasons as well. Contact by opposing counsel of absentee class members rests in the trial court's discretion, which should be exercised to avoid any unfairness.[83] *Chrapliwy* v. *Uniroyal, Inc.,* 71 F.R.D. 461, 464 (N.D. Ind. 1976); *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.,* 455 F. 2d 770, 775 (2d Cir. 1972).

Additionally, there would have been ample cause for the district court, in its discretion, to have excluded evidence as to the results of the proposed survey. The proposed survey, set forth at 1 App. 284-292, was to be made by counsel for appellants in the form of a letter, attached questionnaire and an instruction sheet, to be mailed to members of the health care provider class with responses returned by mail. The cover letter explained that the Attorney General was conducting the survey in relation to this law suit. The questionnaire, which did not distinguish between mature and immature minors, sought information on practices for parental consent to abortion and other medical procedures for minors, and requested justification for the particular practices used. 1 App.

[83] The district court could reasonably have considered the potential mischief to be worked by an entirely unexpected letter

291. The survey appears to have been prepared by counsel; no representation was made that it was prepared by anyone expert in the field. The motion to conduct the survey did not set forth the size of the sample to be surveyed, and did not attempt to demonstrate that the survey method was free from bias or likely to produce accurate results.

The survey met none of the requirements of admissibility for survey evidence. The survey was not to be done to supply the facts upon which an expert witness would reasonably rely in basing an opinion. *See* Fed. R. Evid. 703. It was to be conducted for the truth of the assertions made by the interviewees, and would have been hearsay and inadmissible despite general relaxation of hearsay objections as to surveys. 1 Pt. 2 *Moore's Federal Practice,* Manual for Complex Litigation, Pt. I, § 271, at 119, 121-127. The survey also did not meet the admissibility requirement of scientific validity and trustworthiness. The party seeking admission into evidence of a survey has the burden of establishing that it was conducted in accordance with accepted principles of survey research; that the persons conducting the survey were recognized experts; that the data gathered was accurately reported; and that the sample design, the questionnaire and the interviewing were in accordance with generally accepted standards for such surveys. *Id.* at 126. From the face of appellants' motion and proposed survey, it was obvious that such standards were not met.[84] The survey

arriving at health care facilities from the chief law enforcement officer of the state saying he wanted to know what their practices were regarding consent to medical procedures for minors, and particularly regarding abortion procedures.

[84] *See* Handbook of Recommended Procedures for Trial of Protracted Cases, adopted by the Judicial Conference of the United States, 25 F.R.D. 351, 429 (1960), which specifies as a condition of admissibility that "the sample design and the interviews were conducted independently of the attorneys; and the interviewers, trained in this field, had no knowledge of the litigation or the purposes for which the survey was to be used." Appellants' proposed survey clearly failed to meet these requirements.

would have been inadmissible, *Bank of Utah* v. *Commercial Security Bank,* 369 F. 2d 19, 27-28 (10th Cir. 1966); *Sears Roebuck & Co.* v. *All States Life Ins. Co.,* 246 F. 2d 161, 171-172 (5th Cir.), *cert. denied,* 355 U.S. 894 (1957), and so hardly justified the dangers of delay inherent in appellants' motion. Fed. R. Evid. 403.

Appellants' bootstrap conclusion that the lack of survey evidence meant that the trial court based its decision on inadequate evidence is insubstantial. On the issue of consent to medical procedures for minors, the district court had before it the state court's description of the traditional and newly announced common law rules with respect to consent by or on behalf of mature and immature minors; the statutory requirements for consent to various medical procedures; and testimony of several physicians as to the consent practice at their health facilities. *E.g.,* 2 App. 12, 103, 125-126, 136, 162, 184. Had appellants wished to call additional physicians or hospital or clinic administrators, appellants were free to do so. The evidence before the court was relevant and reliable and afforded an adequate basis for decision.

B. *The District Court's Order Allocating Certain Costs Is Not a Ground for Reversal of the Judgment Below.*

The district court's order in *Baird III* awarding certain costs (1 App. 64) does not affect any of the intervenor-appellees, and, of course, has nothing to do with the substantive merits of this case. When it issued this order, the district court apparently was unaware of this Court's August 2, 1976 order dividing certain costs in *Bellotti I,*

since that order was issued somewhat over a month after the decision in *Bellotti I,* and since appellants themselves apparently overlooked it as late as the time of filing of their Jurisdictional Statement (which does not mention the August 2, 1976 order). Insofar as the district court's allocation of costs is inconsistent with this Court's August 2, 1976 order, appellants can and should move the district court under Fed. R. Civ. P. 60(b)(6) for modification of the cost award.

Appellants' argument in this section of their Brief contains a number of incorrect statements, however. The district court on two occasions has outlined in detail the changes over time in appellants' proffered interpretations of the statute, as well as the differences between what appellants represented to this Court and to the state court that the statute meant, and what the state court said it meant. See *Baird III* at 999-1000; *Baird II* at 855, 857.[85] Particularly egregious is appellants' claim that both this Court and the state court have "in large measure . . . found convincing" (Brief, 64) appellants' "position that the statute should be interpreted as a protective legislative act" (Brief, 64 n.37). Plainly, the statute is no mere protective legislative act, was not so construed by the state court, and should not be so construed by this Court.

Conclusion.

For the foregoing reasons, this Court should affirm the district court's judgment. In so ruling, this Court would not be signalling disapproval of legislation which, unlike the Massachusetts statute, encourages and prefers parental consultation for a minor but permits it to be bypassed

[85] This history belies appellants' claims that their "view of the statute's provisions and that of the Supreme Judicial Court . . . are so similar." Brief for the Appellants, 64.

without judicial involvement where in the minor's physicians' professional judgment it would be against her best interests.[86]

Respectfully submitted,

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[86] See Appendix A hereto.

Appendix A.

Md. Health Code Ann., Art. 43, §135(e), as added by 1977 Md. Laws ch. 961:

> (e) Notwithstanding any other provision of this section, no abortion shall be performed upon an unmarried minor female without prior notification of parent or guardian, unless the minor is living apart from her parent or guardian and a reasonable effort to notify them has been unsuccessful. A receipt that a registered or certified letter was mailed attached to a copy of the notice letter sent to such parent or guardian at his or her last known address shall be conclusive evidence of notice or attempted notice required by this subsection. Notification may be waived if the physision in his professional judgment, believes that notification might reasonably be expected to lead to abuse, either physically or emotionally, of the pregnant minor; however, there may not be criminal or civil liability on the part of a physician for his decision to waive this notification.